Supreme Court, U.S.
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No. 02-9410

In The Supreme Court of the United States

MICHAEL D. CRAWFORD,

Petitioner,

v.

WASHINGTON,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Washington

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES FROM THE COURTS BELOW

08/10/99	Thurston County, WA Superior Court	Information Filed Against Petitioner for (1) Attempted First Degree Murder with a Deadly Weapon and (2) First Degree Assault with a Deadly Weapon
10/18/99-10/22/99	Thurston County, WA Superior Court	Petitioner's Trial
10/22/99	Thurston County, WA Superior Court	Petitioner Found (1) Not Guilty of Attempted First Degree Murder with a Deadly Weapon and (2) Guilty of First Degree Assault with a Deadly Weapon
11/19/99	Thurston County, WA Superior Court	Petitioner Sentenced to 174 Months in Prison
11/19/99	WA Court of Appeals, Division II	Notice of Appeal Filed by Petitioner
02/21/01	WA Court of Appeals, Division II	Oral Argument Heard
07/30/01	WA Court of Appeals, Division II	Opinion Issued, Petitioner's Conviction and Sentence Reversed
10/02/01	WA Supreme Court	Petition For Review Filed by Respondent
03/05/02	WA Supreme Court	Petition for Review Granted
5/23/02	WA Supreme Court	Oral Argument Heard
9/26/02	WA Supreme Court	Opinion Issued, Petitioner's Conviction and Sentence Reinstated
10/16/02	WA Supreme Court	Motion for Reconsideration Filed by Petitioner
12/12/02	WA Supreme Court	Motion for Reconsideration Denied

54 P.3d 656

Supreme Court of Washington,
En Banc.

STATE of Washington, Petitioner,
v.
Michael **D. CRAWFORD**, Respondent.

No. 71683-8.

Argued March 5, 2002.
Decided Sept. 26, 2002.

BRIDGE, J.

This case presents two issues: (1) whether a defendant waives an objection under the confrontation clause to the admission of his wife's hearsay statements by exercising his marital privilege to prevent his spouse from testifying; and (2) whether the wife's statements are otherwise admissible as an exception to the hearsay rule or as an interlocking confession. We hold that a defendant does not waive his confrontation rights when he invokes the marital privilege. We also conclude that the statements here are admissible because the wife's statements interlock with those of her husband and hence provide adequate indicia of reliability to satisfy confrontation clause concerns.

FACTS

On August 5, 1999, Michael Crawford stabbed Richard Rubin Kenneth Lee at Lee's apartment. *State v. Crawford*, noted at 107 Wash.App. 1025, 2001 WL 850119, at *1 (2001). Police arrested Crawford that evening and they collected two taped statements from both Crawford and his wife, Sylvia, who had been present at the time of the

assault. Id. The first statements contained roughly the same account of the attack: the three had collected at Lee's house; Crawford left to buy alcohol; when he returned, Lee was making sexual advances toward Sylvia; Crawford stabbed Lee twice. Id.

Several hours after police taped the first statements, they again questioned the Crawfords independently regarding the events of August 5. Id. Their stories were again similar to each other, but distinctly different from the earlier version of the encounter. Id. This time the Crawfords each revealed that the alleged sexual assault had actually occurred several weeks earlier. Id. On the night in question, both Crawfords contended, Michael became angry when Lee was mentioned and he and his wife left to find Lee. Id. Sylvia directed her husband to Lee's apartment and after talking with him for a short period, Crawford stabbed Lee twice. Id. Although unclear, the main distinguishing factor in these second statements was that Crawford alluded that Lee *may* have had something in his hand *when* Crawford stabbed Lee, while Sylvia implied that Lee *may* have grabbed for something *after* Crawford stabbed Lee. Id.

Crawford was charged with attempted first degree murder while armed with a deadly weapon and first degree assault while armed with a deadly weapon. Clerk's Papers (CP) at 2. At trial, Crawford claimed that he acted in self-defense and he invoked the marital privilege to prevent his wife from testifying against him. Report of Proceedings (RP) at 7-8. The trial court admitted both of Sylvia's statements on the grounds that the statements would not violate the marital privilege and because the court determined that the statements were sufficiently reliable to alleviate confrontation clause concerns. RP at

45, 53; RP at 219-21, Exs. 37, 38; RP at 231, Exs. 41-42. A jury subsequently convicted Crawford of first degree assault while armed with a deadly weapon. CP at 2. In an unpublished opinion, a divided Court of Appeals concluded that Crawford did not waive his right to confrontation when he invoked the marital privilege. *Crawford,* 2001 WL 850119, at *1. It then held that admitting Sylvia's second statement was reversible error because her statement did not possess adequate indicia of reliability, nor did it interlock with Michael's second statement. Id. at *5-7. Accordingly, the Court of Appeals reversed Crawford's conviction. Id. at *1. We granted review.

WAIVER OF RIGHT TO CONFRONTATION

Crawford invoked the marital privilege, RCW 5.60.060, to keep his wife from testifying against him at trial. RP at 7. The marital privilege in Washington states in relevant part:

> A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without the consent of the other, examined as to any communication made by one to the other during marriage.

RCW 5.60.060(1). Neither Crawford nor the State called Sylvia to testify. *See* RP at 7-14. Crawford claims, however, that his confrontation right under the Sixth Amendment, as applied to the states through the due process clause of the Fourteenth Amendment, was violated when Sylvia's hearsay statements to the police were admitted at trial.

The State contends that Crawford waived his right to confrontation when he neglected to call Sylvia at trial, relying on *State v. Salazar,* 59 Wash.App. 202, 796 P.2d 773 (1990) and *In re Personal Restraint of Sauve,* 103 Wash.2d 322, 692 P.2d 818 (1985), to support its position. While instructive, both *Salazar* and *Sauve* contain a key distinction from the case before us, making them distinguishable. In those cases the witness was "available"; Sylvia Crawford was not an available witness.

In *Salazar,* the defense counsel did not call an informant suggesting that defense was unable to locate him. 59 Wash.App. at 216, 796 P.2d 773. Rejecting the assertion that the witness was unavailable, the court stated, "We have held that a defendant who fails to call an available hearsay declarant waives an objection under the confrontation clause to admission of the hearsay." *Salazar,* 59 Wash.App. at 217, 796 P.2d 773 (citing *State v. Borland,* 57 Wash.App. 7, 12, 786 P.2d 810 (1990)). "Similarly, defense counsel's failure to call [the informant], who we assume was available absent persuasive evidence to the contrary, waived any confrontation clause objection." *Id.*

In *Sauve,* the defendant claimed that his confrontation right was violated when the police officer who received an informant's tip, failed to testify at the suppression hearing. 103 Wash.2d at 329, 692 P.2d 818. Although the court did not directly hold that Sauve had waived his confrontation right, it did note that the defendant's failure to exercise his rights at trial did not constitute a denial of such rights by the court. *Sauve,* 103 Wash.2d at 330, 692 P.2d 818 (citing *State v. Murphy,* 35 Wash.App. 658, 669 P.2d 891 (1983); *State v. Whittington,* 27 Wash.App. 422, 618 P.2d 121 (1980)). Accordingly, the court stated,

> There is no evidence that petitioner asked the State for the testimony of the officer who received the tip, nor did petitioner himself attempt to call the officer to the stand. The State was not given a chance at trial to either present the officer's testimony or prove his unavailability. The failure of petitioner to exercise his rights at trial does not constitute a denial of such rights.

Id.

In both *Salazar* and *Sauve* the witnesses were available, but the defense failed to call them at trial. In the case presented, in contrast, the witness, Sylvia Crawford, was unavailable to testify because Michael Crawford had invoked his marital privilege. The marital privilege explicitly states that "[a] husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband." RCW 5.60.060(1). This language specifically denies Sylvia the ability to testify either for or against her husband, rendering her unavailable as a witness. Although Michael, not Sylvia, invoked the privilege, the result is the same – Sylvia was unavailable to testify, unlike the witnesses in *Salazar* and *Sauve*. Therefore, the situation before us is distinct from *Salazar* and *Sauve* and it does not logically follow that Crawford waived his confrontation rights by not calling his wife to testify.

The conclusion that Crawford did not waive his confrontation rights is supported by a decision from this court that directly addressed the issue of marital privilege and extrajudicial statements by a third party. *See State v. Burden*, 120 Wash.2d 371, 374, 841 P.2d 758 (1992). In *Burden*, this court stated, "Here, the defendant asserts admission of Mary Burden's extrajudicial statements by

third persons would indirectly violate the testimonial privilege and place [the defendant] in the position of having to waive the privilege to refute the testimony or allow the testimony without cross examination. We have previously rejected this argument." *Id.* (citing *State v. Kosanke*, 23 Wash.2d 211, 160 P.2d 541 (1945)). By recognizing the rejection of this argument, this court implied that the testimonial privilege is not violated by admissible hearsay statements and, furthermore, that the defendant does not have to waive the marital privilege to refute the testimony. Therefore, the defendant cannot be said to have waived his right to cross examination.[1]

Further, courts are hesitant to accept waiver of a defendant's Sixth Amendment rights because of their significance in the trial process. *See generally* John R. Kroger, *The Confrontation Waiver Rule*, 76 B.U. L.REV.

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[1] Citing *Kosanke*, the *Burden* court further supported its position that the admission of the testimony neither indirectly violated the marital privilege nor forced the defendant to waive the privilege to refute the testimony.

> "[T]he court [has not gone] so far as to hold that relevant and material evidence could not be adduced merely because, in order to refute the same, the wife of a defendant might have to be called as a witness. In this case the wife of appellant was not called as a witness by respondent, nor was the attention of the jury called to her in such a way as to require objection on the part of appellant in order to preserve his rights under the statute. . . . [T]he fact that refutation of competent evidence would require the wife being a witness does not make it erroneous to adduce the testimony. *The statute [testimonial privilege] was not violated either directly or indirectly.*"

Burden, 120 Wash.2d at 374, 841 P.2d 758 (quoting *Kosanke*, 23 Wash.2d at 217-18, 160 P.2d 541). According to this passage it is clear that the marital privilege still stands, as well as the right to confront the witness; neither has been waived.

835 (1996). "'There are few subjects, perhaps, upon which [the Supreme Court] and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.'" *Id.* at 840 (quoting *Pointer v. Texas,* 380 U.S. 400, 405, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965)). Where a waiver has been recognized, the waiver usually occurs when the defendant has inappropriately caused the witness's unavailability. *Id.* at 844. Thus, "'a defendant may waive the right to confront witnesses against him when his own misconduct is responsible for a witness's unavailability at trial.'" *Id.* at 842 (quoting *United States v. Potamitis,* 739 F.2d 784, 788 (2d Cir.1984)). Misconduct is not apparent when a defendant invokes a statutory privilege, however. *See United States v. Barlow,* 693 F.2d 954, 962 (6th Cir.1982) (suggesting that only sham marriage would result in waiver, but admitting legitimate spouse's grand jury testimony when it met adequate guarantees of trustworthiness). In the case before us Crawford invoked a recognized statutory privilege.[2]

[2] Although no formula has emerged for application of the confrontation waiver rule, case law suggests six major legal issues that courts will resolve before applying the doctrine: "(1) witness unavailability, (2) cause of unavailability, (3) intent, (4) standard of proof, (5) statement reliability, and (6) waiver hearing procedure." Kroger, *supra,* at 846. The key element for this case is the cause of the unavailability. "Two paradigmatic ways in which a defendant satisfies the causation requirement have evolved: murder and threats." *Id.* at 849. From this statement it is apparent that the evolution of the waiver doctrine has not been directed at the legitimate invocation of statutory privileges, absent threat or other indication of malfeasance.

As the Court of Appeals acknowledged here, forcing the defendant to choose between the marital privilege and confronting his spouse presents an untenable Hobson's choice. *Crawford,* 2001 WL 850119, at *1. The Court of Appeals aptly noted that this court traditionally has "not required a defendant to waive one right to preserve another." *Id.* (citing *State v. Michielli,* 132 Wash.2d 229, 246, 937 P.2d 587 (1997) (upholding dismissal of case where defendant was forced to choose between waiving right to speedy trial or right to effective assistance of counsel); *State v. Price,* 94 Wash.2d 810, 814, 620 P.2d 994 (1980) (stating that forcing defendant to choose between effective assistance of counsel and speedy trial impermissibly prejudices defendant)). Both *Michielli* and *Price* present situations where a defendant was forced to balance his trial rights and ultimately select one right to the exclusion of the other. To force a defendant to choose the more difficult position of confronting his spouse on the stand, or to assume that he has waived his confrontation right by electing not to call his wife, presents a similarly untenable choice and undermines the marital privilege itself. Therefore, we hold that Crawford did not waive his right to confrontation when he invoked the marital privilege.

ADMISSIBILITY OF HEARSAY

If Crawford did not waive his right to confrontation, the State contends in the alternative that Sylvia's out-of-court statements to the police were admissible hearsay that did not violate the Sixth Amendment.

This court has noted a distinction between in-court testimony and extrajudicial statements by a spouse. In drawing a distinction between the two, we have concluded

that hearsay statements may be admissible under certain circumstances. *Burden,* 120 Wash.2d at 377, 841 P.2d 758. Forcing a spouse to testify, however, challenges the policy purposes behind the privilege. In *Burden,* this court determined that the policy purposes – fostering domestic harmony and preventing discord, reflecting the natural repugnance of having one spouse testify against the other, and preventing the testifying spouse from having to choose between perjury, contempt of court, or jeopardizing the marriage – supported this distinction. *Id.* at 375, 841 P.2d 758 (citing *State v. Thorne,* 43 Wash.2d 47, 55, 260 P.2d 331 (1953); *State v. Wood,* 52 Wash.App. 159, 163, 758 P.2d 530 (1988); Teresa Virginia Bigelow, Comment, *The Marital Privileges in Washington Law: Spouse Testimony and Marital Communications,* 54 WASH. L.REV. 65, 70 (1978-79)). We concluded that the latter two purposes would not be affected by allowing third person testimony, because the spouse would not be testifying in court, and questioned the applicability of the first purpose. *Burden,* 120 Wash.2d at 375-76, 841 P.2d 758. Thus, as we have acknowledged, confronting a spouse on the stand is quite distinct from admitting an extrajudicial statement.

To assess whether an extrajudicial hearsay statement is admissible we apply a multilayered analysis, in consideration of the valuable constitutional protections afforded by the Sixth Amendment. Simply because a statement falls within a hearsay exception does not mean that it will satisfy the Sixth Amendment. *State v. Rice,* 120 Wash.2d 549, 565, 844 P.2d 416 (1993). Therefore, the court will employ specific safeguards "'to ensure that the proffered evidence offers some reliability in terms of the declarant's perception, memory and credibility – a function traditionally performed by cross examination.'" *Id.* at 566, 844 P.2d

416 (quoting *State v. Anderson,* 107 Wash.2d 745, 750-51, 733 P.2d 517 (1987)).

First, the statements must be admissible under the rules of evidence. *Rice,* 120 Wash.2d at 564, 844 P.2d 416. Second, the statements must contain a sufficient indicia of reliability and trustworthiness to satisfy the requirements of the confrontation clause. *Id.* A firmly rooted exception to the hearsay rule will satisfy this requirement. *State v. Davis,* 141 Wash.2d 798, 845, 10 P.3d 977 (2000). If the exception is not firmly rooted, then the court will consider nine nonexclusive factors to determine the relative reliability of the hearsay statements.[3] *Rice,* 120 Wash.2d at 565-66, 844 P.2d 416; *State v. Whelchel,* 115 Wash.2d 708, 722-25, 801 P.2d 948 (1990). Alternatively, the indicia of reliability test can be met if the statements "interlock" in accordance with our decision in *Rice.* 120 Wash.2d at 569-70, 844 P.2d 416.

Sylvia's first statement to the police is not hearsay because it was not offered to prove the truth of the matter

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[3] The nine factors include: (1) whether the declarant, at the time of making the statement, had an apparent motive to lie; (2) whether the declarant's general character suggests trustworthiness; (3) whether more than one person heard the statement; (4) the spontaneity of the statement; (5) whether trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness; (6) whether the statement contains express assertions of past fact; (7) whether the declarant's lack of knowledge could be established by cross-examination; (8) the remoteness of the possibility that the declarant's recollection is faulty; and (9) whether the surrounding circumstances suggest that the declarant misrepresented the defendant's involvement.

asserted.[4] ER 801(c). Instead, as the Court of Appeals noted, it was offered to demonstrate that the Crawfords lied about the circumstances preceding the assault. *Crawford,* 2001 WL 850119, at *5. Considering that out-of-court statements raise hearsay and confrontation clause objections only when they are offered to prove the truth of the matter asserted, Sylvia's first statement is not inherently objectionable. *State v. Parris,* 98 Wash.2d 140, 145, 654 P.2d 77 (1982). It will be admissible, however, only if it is relevant under ER 401, and it is relevant only if her second statement is admitted.

Sylvia's second statement is hearsay: The declarant is unavailable at trial – because Crawford invoked the marital privilege – and the statement is being offered to prove the truth of the matter asserted. ER 801(c). The State contends that Sylvia's second statement is admissible under ER 804(b)(3), the hearsay exception for a declarant's statement against penal interest. A statement against penal interest is not considered a firmly rooted exception to the hearsay rule, however. *Whelchel,* 115 Wash.2d at 715, 801 P.2d 948. Therefore, "out-of-court statements from a nontestifying codefendant made against penal interests and which inculpate the defendant are admissible against the defendant only when they bear adequate indicia of reliability." *State v. St. Pierre,* 111 Wash.2d 105, 113, 759 P.2d 383 (1988) (citing *Anderson,* 107 Wash.2d at 750, 733 P.2d 517; *State v. Dictado,* 102

[4] The defense counsel did not object to the admission of the statements as hearsay when they were presented at trial. *See* RP at 219-32. Defense argument appears to hinge on the previous invocation of the marital privilege and right to confrontation. *See* RP at 7-21, 37.

Wash.2d 277, 287-88, 687 P.2d 172 (1984)). Thus, we must determine whether the statement contains a sufficient indicia of reliability to satisfy the confrontation clause. *See Ohio v. Roberts,* 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

Before we determine whether the statement is sufficiently reliable to satisfy confrontation clause concerns, we must assess which portions of the statement were actually against Sylvia's penal interest. Only the portions of Sylvia's statement that are self-inculpatory will be admitted under the statement against interest exception to the hearsay rule. *See State v. Roberts,* 142 Wash.2d 471, 491-97, 14 P.3d 713 (2000); ER 804(b)(3). In *Roberts* this court adopted the Supreme Court's rejection of a "whole statement" approach to defendant declarations. 142 Wash.2d at 494, 14 P.3d 713 (adopting *Williamson v. United States,* 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994)). Therefore, even though self-exculpatory statements may be included within a statement that is generally inculpatory, only those portions that are actually self-inculpatory are admissible. *Id.* at 492-94, 14 P.3d 713.

A statement against interest, or self-inculpatory statement, is defined as:

> A statement which was *at the time of its making* so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true.
>
> ER 804(b)(3) (emphasis added).

Crawford objected to the admission of Sylvia's statements that he was "'infuriated,'" "'past tipsy,'" and that he said Lee "'deserves a ass whoopin.'" *Crawford,* 2001 WL 850119, at *7 n. 3 (Armstrong, C.J., dissenting). He also objected to the admission of Sylvia's statement regarding whether Lee reached for or possessed a weapon when Michael assaulted him because it allegedly rebutted his own testimony and damaged his self-defense claim.

While potentially damaging to Michael, these statements are all inculpatory of Sylvia as well. It was Sylvia who showed Michael where to find Lee and she was present through the duration of the violent encounter. She walked away from the stabbing with Michael and did not turn to the police when she had the opportunity. As a potential accomplice,[5] therefore, Sylvia would benefit from limiting Michael's involvement; the lesser his charge, the lesser her accomplice liability. Sylvia's statements that Michael was "infuriated," "past tipsy," and that he said Lee "deserves a ass whoopin" would not shift blame from her to Michael, but rather it could increase Michael's culpability, and potentially hers as well. Furthermore, if Sylvia knew that Michael wanted to give Lee an "ass whoopin" and took Michael to find Lee, this fact could support a charge against Sylvia for accomplice liability because she could be viewed as encouraging or aiding the facilitation of a crime. *See* RCW 9A.08.020(3)(a). Likewise, Sylvia's

[5] An accomplice is someone who with knowledge that it will promote or facilitate the commission of a crime either (1) solicits, commands, encourages, or requests such other person to commit the crime or (2) aids or agrees to aid the other person in planning or committing the crime. RCW 9A.08.020(3)(a).

assertion that Lee may have reached into his pocket, possibly for a weapon, but had empty hands when Michael stabbed him, would be against her interest. Rather, she would benefit her own case if she had said that Lee wielded a weapon throughout the confrontation and that Michael was merely protecting himself. Therefore, we conclude that these statements were self-inculpatory and admissible hearsay, provided they meet a sufficient indicia of reliability.

Because a codefendant's confession is presumed unreliable,[6] the statement must either meet a firmly rooted exception to the hearsay rule[7] or provide some indicia of reliability, such as interlocking with the defendant's own confession. *St. Pierre,* 111 Wash.2d at 112-13, 759 P.2d 383. The State asserts that Sylvia's second statement is admissible as an interlocking confession with Michael's second statement. *See generally Rice,* 120 Wash.2d 549, 844 P.2d 416 (adopting *Lee v. Illinois,* 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986)). As this court recognized in *Rice,* "[w]hen a codefendant's confession is virtually identical [i.e., interlocks] to that of a defendant, it may be deemed reliable." *Id.* at 570, 844 P.2d 416 (citing *Lee,* 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d

[6] Although Sylvia is not a codefendant, as she has not been formally charged with a crime, her role is similar to that of a codefendant. She was present during the assault, was arrested and gave a statement to the police concerning the events, and had an arguable motive to shift the blame away from herself. Her role in this case thus suggests applying the *Rice* interlocking confession analysis by analogy.

[7] As previously noted, a statement against penal interest is not a firmly rooted hearsay exception for purposes of the confrontation clause.

514). Hence an interlocking confession will serve the same purpose as the nine-factor test in assessing reliability. *Id.*

The Court of Appeals here held that, although the Crawfords' statements were "very similar," they differed regarding whether Lee was armed when Michael stabbed him. *Crawford,* 2001 WL 850119, at *6. Following are the two statements for comparison.

Sylvia's statement:

Q: did Kenny do anything to fight back from this assault

A: (pausing) I know he reached into his pocket . . . or somethin' . . . I don't know what

Q: after he was stabbed

A: he saw Michael coming up. He lifted his hand . . . his chest open, he might of went to go strike his hand out or something and then (inaudible)

Q: okay, you, you gotta speak up

A: okay, he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his . . . put his right hand in his right pocket . . . took a step back . . . Michael proceeded to stab him . . . then his hands were like . . . how do you explain this . . . open arms . . . with his hands open and he fell down . . . and we ran (describing subject holding hands open, palms toward assailant)

Q: okay, when he's standing there with his open hands you're talking about Kenny, correct

A: yeah, after, after the fact, yes

Q: did you see anything in his hands at that point

A: (pausing) um um (no)

Ex. 42, at 6-7.

Michael's statement:

Q: okay. Did you ever see anything in [Lee's] hands

A: I think so, but I'm not positive

Q: okay, when you think so, what do you mean by that

A: I coulda swore I seen him goin' for somethin' before, right before everything happened. He was like reachin', fiddlin' around down here and stuff . . . and I just . . . I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut . . . but I'm not positive. I, I my mind goes blank when things like this happen. I mean, I just, I remember things wrong, I remember things that just doesn't, don't make sense to me later.

Ex. 44, at 7.

Although the Court of Appeals concluded that the statements were contradictory, upon closer inspection they appear to overlap. The Court of Appeals stated that Sylvia's version of the story had Lee grabbing for something only after he had been stabbed, while Michael stated that Lee may have had something in his hand before the attack. *Crawford,* 2001 WL 850119, at *6. However, when asked whether Lee fought back from the assault, Sylvia states that Lee "lifted his hand over his head maybe to

strike Michael's hand down or something and then he put his hands in his . . . put his right hand in his right pocket . . . took a step back . . . Michael proceeded to stab him. . . ." Ex. 42, at 7. She also previously stated that she was unsure how Michael received the cut on his hand. *Id.* at 6. Thus, it is unclear from Sylvia's statement when, if ever, Lee possessed a weapon.

Michael's statement is equally ambiguous. He states, "I coulda swore I seen him goin' for somethin' before, right before everything happened. He was like reachin', fiddlin' around down here and stuff . . . and I just . . . I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut . . . but I'm not positive." Ex. 44, at 7. Thus, both of the Crawfords' statements indicate that Lee was possibly grabbing for a weapon, but they are equally unsure when this event may have taken place. They are also equally unsure how Michael received the cut on his hand, leading the court to question when, if ever, Lee possessed a weapon. In this respect they overlap.

Self-defense is at issue in this case, so admittedly the timing of Lee's possession of a weapon is significant. However, both of the Crawfords' statements are ambiguous as to whether Lee ever actually possessed a weapon. The interlocking confession rule is designed to admit "virtually identical" statements. *Rice,* 120 Wash.2d at 570, 844 P.2d 416. As the dissent from the Court of Appeals noted, and we agree, "neither Michael nor Sylvia clearly stated that Lee had a weapon in hand from which Michael was simply defending himself. And it is this omission by both that interlocks the statements and makes Sylvia's statement reliable." *Crawford*, 2001 WL 850119, at *7 (Armstrong, C.J., dissenting). *Because Sylvia's and*

Michael's statements are virtually identical, admission of Sylvia's statement satisfies the requirement of reliability under the confrontation clause.

CONCLUSION

We hold that a defendant does not waive his Sixth Amendment right to confront an adverse witness when he invokes the marital privilege to keep his wife from testifying at trial. Thus, Michael Crawford did not waive his confrontation clause rights when he invoked RCW 5.60.060 and refused to call his wife, Sylvia, to testify at his trial. Sylvia's pretrial statements to the police, at issue in this case, were admissible, however, because they were self-inculpatory and they interlocked with Michaels' own admissible statements.

We reverse the Court of Appeals and reinstate the conviction.

ALEXANDER, C.J., SMITH, JOHNSON, MADSEN, SANDERS, IRELAND, CHAMBERS and OWENS, JJ., concur.

107 Wash.App. 1025

Court of Appeals of Washington, Division 2.

STATE of Washington, Respondent,
v.
Michael CRAWFORD, Appellant.

No. 25307-1-II.

July 30, 2001.

Appeal from Superior Court of Thurston County, Docket No. 99-1-01205-8, judgment or order under review, date filed 11/19/1999; Richard A. Strophy, Judge.

UNPUBLISHED OPINION

BRIDGEWATER, J.

Michael Crawford appeals his conviction of first degree assault while armed with a deadly weapon. We reverse.

FACTS

On August 5, 1999, defendant Michael D. Crawford stabbed Rubin Richard Kenneth Lee at Lee's home. Police apprehended Michael that evening and he gave two taped statements. His wife, Sylvia Crawford, was with him during the stabbing; she also gave police two taped statements.

The Crawfords' first taped statements contained roughly similar stories. The Crawfords stated that they knew Lee and that they went to visit him at his apartment the day of the stabbing. Michael left briefly to go to a nearby store. Lee then made sexual advances toward Sylvia, which she fought off. Michael returned and heard

his wife yelling. Michael and Lee started to fight and Lee was stabbed. The Crawfords quickly left.

The police separately questioned the Crawfords a second time several hours later. Again their statements were roughly similar, but the stories changed from the first version. They each stated that the alleged sexual assault by Lee against Sylvia had actually occurred several weeks earlier.

On the day of the stabbing, the Crawfords were visiting with friends when someone mentioned Lee. Michael became angry and he and Sylvia went to find Lee. They went to several bars looking for Lee before going to his apartment. They knocked at the wrong apartment, but Lee opened his door. The three talked for a short time and then Michael stabbed Lee. The difference in the second statements is that in Michael's second statement he says that Lee may have had something in his hand when he stabbed Lee, but in Sylvia's second statement, she says that Lee may have grabbed for something later, after Michael stabbed him.

The trial judge admitted both of Sylvia's statements after Michael invoked the marital privilege to prevent her from testifying.

The jury convicted Michael of first degree assault while armed with a deadly weapon.

ANALYSIS

I. Waiver of the Confrontation Right

The State, citing *State v. Salazar,* 59 Wn.App. 202, 217, 796 P.2d 773 (1990), argues that Michael waived his

right to confrontation by not allowing Sylvia to testify. The marital privilege statute, RCW 5.60.060(1), states that a wife shall not be examined for or against her husband without her husband's consent. The State argues that Michael could have allowed Sylvia to testify, and by not doing so, he waived his right to confrontation. We disagree.

The *Salazar* Court held that a defendant who fails to call an available hearsay declarant waives a confrontation clause objection to the hearsay statement. We question this result. But even if we accept *Salazar*'s reasoning, the issue here is different. In *Salazar*, the defendant had no right to prevent the witness from testifying. Here, Michael had a statutory right to keep his wife from testifying against him. And the State cites no authority to support the notion that a defendant waives his or her constitutional right to confront an adverse witness by invoking another right to keep the witness from testifying. Moreover, the argument runs counter to the rationale of *State v. Burden,* 120 Wn.2d 371, 378, 841 P.2d 758 (1992), where the court held that marital privilege does not bar third-person testimony of the defendant's wife's hearsay statements, but the statements "must still meet other requirements for admissibility." If a defendant waives a confrontation clause challenge by invoking the marital privilege, there would be no other requirements to meet. Furthermore, in other settings, we have not required a defendant to waive one right to preserve another. *See State v. Michielli,* 132 Wn.2d 229, 246, 937 P.2d 587 (1997) (upholding dismissal of a case where defendant was forced to choose between waiving the right to a speedy trial or the right to effective assistance of counsel); *State v. Price,* 94 Wn.2d 810, 814, 620 P.2d 994 (1980) (stating that

forcing defendant to choose between effective assistance of counsel and speedy trial impermissibly prejudices defendant). Forcing Michael to relinquish the marital privilege to preserve his right to confrontation would render the marital privilege meaningless. We decline to do so.

II. Admissibility of Sylvia's Out-of-Court Statements

A. Standard of Review

We use a three-step analysis to review the trial court's decision to admit Sylvia's statements. "First, we must determine whether the statements are admissible under our Rules of Evidence. Second, we consider whether additional indicia of reliability satisfy the requirements of the confrontation clause. Finally, even if a statement fails to meet these requirements, we consider whether or not the error was harmless." *State v. Rice,* 120 Wn.2d 549, 564, 844 P.2d 416 (1993).

B. Admissibility of Sylvia's Statements

Michael argues that Sylvia's out-of-court statements to the police were inadmissible under the confrontation clause of the Sixth Amendment and ER 804(b)(3). The confrontation clause gives a defendant the right to "be confronted with the witnesses against him." U.S. Const. amend. 6. Hearsay evidence does not offend the confrontation clause if the hearsay statement bears "adequate indicia of reliability." *Ohio v. Roberts,* 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). A statement bears adequate indicia of reliability if it (1) falls within a firmly rooted hearsay exception or (2) contains "particularized guarantees of trustworthiness." *Roberts,* 448 U.S. at 66. ER 804(b)(3) – the hearsay exception for statements

against the declarant's penal interest – is not considered a firmly rooted hearsay exception. *State v. Whelchel,* 115 Wn.2d 708, 715, 801 P.2d 948 (1990).

But evidence that satisfies the third prong of ER 804(b)(3) also satisfies the confrontation clause requirement of "indicia of reliability." ER 804(b)(3) allows the court to admit a hearsay statement against penal interest if (1) the declarant is unavailable at trial; (2) the statement tends to subject the declarant to criminal liability such that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true; and (3) corroborating circumstances clearly indicate the trustworthiness of the statement. ER 804(b)(3). The corroboration requirement under ER 804(b)(3) "arguably mirrors" the trustworthiness requirement under the confrontation clause. *Whelchel,* 115 Wn.2d at 716. Thus, a corroborated inculpatory statement that is admissible under ER 804(b)(3) satisfies the confrontation clause as well. *Whelchel,* 115 Wn.2d at 716-17.

1. The First Statement

Sylvia made two statements to the police. The State correctly points out that Sylvia's first statement is not hearsay because it was not used to prove the truth of the matter asserted. Rather, it was used to show that the Crawfords initially lied about the circumstances that led up to the stabbing. Confrontation and hearsay problems arise only when the out-of-court statement is offered to prove the truth of the matter asserted. *State v. Parris,* 98 Wn.2d 140, 145, 654 P.2d 77 (1982). Thus, Sylvia's first statement is not objectionable under the confrontation clause or ER 804(b)(3). However, it is admissible only if it

is relevant under ER 401, and it is relevant only if the second statement is admitted, because the second statement impeaches the first by its supposed truthfulness. Thus, if the second statement is not admitted, then the first statement is not relevant and not admissible.

2. The Second Statement

Because Sylvia's second statement is hearsay, the ER 804(b)(3) analysis is necessary. The rule's first requirement – that the declarant be unavailable – is met. ER 804(a) defines "unavailability" to include a witness who is exempt from testifying because of privilege. Here, the parties agreed that Sylvia was unavailable to testify pursuant to the marital privilege statute, RCW 5.60.010(a).

The second requirement of ER 804(b)(3) is that the declarant's statement be against his or her penal interest. Washington courts have analyzed this requirement in the context of accomplices' or co-defendants' hearsay statements. *See, e.g., Whelchel,* 115 Wn.2d 708; *State v. St. Pierre,* 111 Wn.2d 105, 117-18, 759 P.2d 383 (1988). The question is whether the overall circumstances surrounding the statement tend to make it self-serving or disserving. *Whelchel,* 115 Wn.2d at 721. Relevant factors may include a declarant's motive to curry favor with the authorities; whether the declarant gave the statement spontaneously and freely or under potentially coercive conditions; whether the declarant sought to avoid culpability, sought revenge against the defendant, or was afraid of the defendant; and whether the declarant sought a plea bargain. *Whelchel,* 115 Wn.2d at 717-22.

The trial court concluded that Sylvia's second statement, as a whole, was against her penal interest. Although

it was Michael's idea to go find Lee, Sylvia admitted that she agreed to accompany him. She admitted that she showed Michael where Lee lived so that Michael could confront him. She also admitted that she thought the stabbing was 'justified' and did not call the police afterward. These admissions could give rise to accomplice liability for Sylvia. There is no indication that Sylvia was coerced – the detective read Sylvia her Miranda[1] rights, and she waived them. There is also no suggestion of plea-bargaining. Instead of trying to foist blame onto Michael, Sylvia hedged about how Lee was stabbed and whose knife was used to stab him. She also backtracked about how angry Michael was when he found out about Lee's sexual advances. Finally, she defended Michael to the police, saying, "[H]e's one of the most fair people you'll ever meet" and that he was her "best friend." Ex. 42 at 8. Considering this evidence, the trial court concluded that Sylvia's apparent motive in talking to the police was to help Michael.

We hold that the trial court was correct that parts of Sylvia's statement were against her penal interest. But parts of her statement were not against her penal interest. Sylvia described Michael as "infuriated," "enraged," and "past tipsy," and she stated that Michael said Lee "deserves a ass whoopin'." Ex. 42 at 4. These statements, argues Michael, tend to exculpate Sylvia while incriminating him. We agree.

[1] *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

The U.S. Supreme Court considered the same argument in *Williamson v. U.S.,* 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994). The District Court had ruled below that an accomplice's confession was admissible against the defendant under Fed.R.Evid. 804(b)(3). *Williamson,* 512 U.S. at 597. Parts of the confession were self-inculpatory, but other parts were not. *Williamson,* 512 U.S. at 604. After analyzing the text and the principle behind Rule 804(b)(3), the Supreme Court held that it was improper to admit the entire confession. *Williamson,* 512 U.S. at 604. The Court remanded the case for a determination of which parts of the confession were truly self-inculpatory. *Williamson,* 512 U.S. at 604. Our Supreme Court followed *Williamson* in *State v. Roberts,* 142 Wn.2d 471, 499, 14 P.3d 713 (2000), where it held that parts of the non-testifying co-defendant's confession were both against his interest and reliable. Thus, the Roberts court sent the case back to redact the non-testifying co-defendant's statement to allow in evidence only those portions that were against his interest and reliable.

Similarly, parts of Sylvia's statement were not against her penal interest. Thus, the statement-against-penal-interest exception does not apply to these parts, and they are inadmissible unless some other hearsay exception applies. The State argues that these self-exculpatory parts are admissible under ER 803(a)(3), the state-of-mind exception. This exception allows into evidence hearsay statements of "the declarant's then existing state of mind, emotion, sensation or physical condition." But this exception is not applicable here. The declarant is Sylvia; when she said that Michael was "infuriated," "enraged," and "past tipsy," she was describing Michael's state of mind, not her own. Even if the exception applied to Michael's

declaration that Lee "deserves a ass whoopin'," there remains an additional level of hearsay (Sylvia's repeating that statement) that would exclude it. Hearsay within hearsay is inadmissible unless a hearsay exception applies to each statement. ER 805. Thus, because no hearsay exception applies to the self-exculpatory parts of Sylvia's statement, it was error to admit them.

Now we turn to whether Sylvia's redacted statements, i.e., those that were against her penal interest, were reliable. Washington courts use a nine-part test to determine whether an out-of-court statement satisfies the reliability prong of ER 804(b)(3) and the confrontation clause. This nine-part test examines factors that show particularized guaranties of the statement's trustworthiness. *Whelchel,* 115 Wn.2d at 722-25. Not all of the factors need to be present for the statement to be admissible. *State v. Anderson,* 107 Wn.2d 745, 753, 733 P.2d 517 (1987).

The first guideline is whether the declarant had an apparent motive to lie. As noted above, Sylvia's apparent motive was to help Michael. In fact, she admitted that her first statement was in part a lie. And although her statement did not resemble the unequivocal blame-shifting apparent in many accomplice confessions, it also does not show a motive to be truthful.

The second guideline is whether the declarant's general character suggests trustworthiness. Sylvia gave the police two versions of her statement within four hours of each other. This does not suggest trustworthiness.

As in *Whelchel,* the third guideline – whether more than one person heard the statement – is irrelevant here

since the police taped Sylvia's statement. *See Whelchel,* 115 Wn.2d at 722.

The fourth guideline is whether the declarant made the statement spontaneously. The *Whelchel* court found that a voluntary and spontaneous statement suggested more trustworthiness than specific answers to specific questions. *Whelchel,* 115 Wn.2d at 723. Here Sylvia made her statement during police questioning, so the format necessarily consisted of answers to specific questions. Parts of her statement consisted of narrative, but they were not "spontaneous" or "voluntary" in the sense that she offered unsolicited information to the police. She was responding to questions such as "[W]hat happened between you and Kenny the first time[?]" Ex. 42 at 3, or "How did you end up back over there today?" Ex. 42 at 4. But when answering questions that would incriminate Michael, Sylvia was evasive, hedging, or hesitant to respond. Overall, Sylvia's statements do not show the spontaneity that suggests reliability.

The fifth guideline is whether the timing of the statements and the relationship between the declarant and the witness suggests trustworthiness. Statements to friends may be more trustworthy than statements to police. *Whelchel,* 115 Wn.2d at 723. Although one court found reliable a statement made to police immediately after the event in question, the court also noted that the declarant made the statement "without any attempt to fabricate a response." *State v. Rivas,* 49 Wn.App. 677, 688, 746 P.2d 312 (1987). Since Sylvia had already fabricated one response to police and was evasive in parts of her statement, this factor also suggests untrustworthiness.

Guideline six is whether Sylvia's statement contained express assertions of past fact. Her statement is mostly express assertions of past fact. Thus, it did not carry on its face a warning against giving it undue weight. *Whelchel,* 115 Wn.2d at 724. This weighs against admitting the statement.

The seventh guideline is whether cross-examination could help to show the declarant's lack of knowledge. This factor tends to support a finding of trustworthiness. There is no dispute that Sylvia was present before, during, and after the stabbing. But Sylvia stated that she shut her eyes during the stabbing. Cross-examination could show that she did not see Lee attack Michael because of this. We conclude that cross-examination could reveal that she lacked knowledge of what happened.

Guideline eight is the possibility that Sylvia's recollection was faulty because the event was remote. This factor suggests trustworthiness. Sylvia gave her statement the same day of the stabbing, so there is little chance that the events faded in her memory. And although she admits that she had been drinking that day, a breathalyzer test administered by the police indicated a blood alcohol content of .000. Thus, it is unlikely that Sylvia's recollection was faulty.

The final guideline is whether the circumstances surrounding the statement suggest that the declarant misrepresented the defendant's involvement. Sylvia arguably may have tried to misrepresent Michael's involvement in the stabbing, but as we have discussed, she apparently was trying to help him, not implicate him. The fact that Sylvia initially lied to police does suggest untrustworthiness under this guideline (as well as guideline

two). And to the extent that Michael's two inconsistent statements to the police constitute 'circumstances surrounding' Sylvia's statement, they also indicate untrustworthiness.

Overall, the nine-factor test fails to demonstrate that Sylvia's statement to the police was sufficiently reliable to satisfy the third prong of ER 804(b)(3) and the confrontation clause. But the State contends that Michael's confession shows the reliability of Sylvia's statement. Ordinarily, it is inappropriate to look at other evidence to establish a hearsay statement's reliability. *Whelchel,* 115 Wn.2d at 725. But in *State v. Rice,* 120 Wn.2d at 570, our Supreme Court found an accomplice's confession reliable after comparing it to another confession. The Court held that the accomplice's confession in a letter to his girlfriend was reliable and therefore properly admitted against the defendant. But the Court found the same accomplice's confession to police unreliable based on the nine-factor test. Nonetheless, the Court held that the similarity between the two confessions made the police confession reliable and rendered any error in admitting the police confession harmless. In holding that the similarity made reliable an otherwise unreliable confession, the Court relied on *Lee v. Illinois,* 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986), for the rule that "[w]hen a codefendant's confession is virtually identical to that of a defendant, it may be deemed reliable as an 'interlocking' confession." *Rice,* 120 Wn.2d at 570.

But that reasoning does not apply in this case. Although the Crawfords' second statements to the police were very similar – on the day of the stabbing, they were hanging out drinking; someone mentioned Lee; Michael got angry; he and Sylvia set out looking for Lee; they went

to several bars and finally Lee's apartment; they initially knocked on the wrong door; Lee came out; the three of them chatted for a few minutes; Michael stabbed Lee; and the Crawfords ran away – the stories differ regarding whether Lee was armed when Michael stabbed him. Michael's second version asserts that Lee may have had something in his hand when he stabbed him; but Sylvia's version has Lee grabbing for something only after he has been stabbed.[2] The dissimilarity of these statements does

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[2] Sylvia's statement:

Q: Did Kenny do anything to fight back from this assault?

A: (pausing) I know he reached into his pocket . . . or somethin' . . . I don't know what.

Q: After he was stabbed.

A: He saw Michael coming up. He lifted his hand . . . his chest open, he might of [sic] went to go strike his hand out or something and then (inaudible).

Q: Okay, you, you gotta speak up.

A: Okay he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his . . . put his right hand in his right pocket . . . took a step back . . . Michael proceeded to stab him . . . then his hands were like . . . how do you explain this . . . open arms . . . with his hands open and he fell down . . . and we ran (describing subject holding hands open, palms toward assailant).

Q: Okay, when he's standing there with his open hands you're talking about Kenny, correct.

A: Yeah, after, after the fact, yes.

Q: Did you see anything in his hands at that point?

A: (pausing) um um (no).

Ex. 42 at 6-7.

Michael's statement:

Q: Okay. Did you ever see anything in [Lee's] hands?

(Continued on following page)

not satisfy the reliability requirement of the confrontation clause and ER 804(b)(3).

The tests in *Whelchel* and *Rice* are designed to admit evidence that is reliable. They are not designed to elicit impeaching evidence, but to get to the truth of what occurred. In this case, Michael's and Sylvia's second statements are similar, but Sylvia's statement was plainly untrustworthy under the *Whelchel* and *Rice* tests. Thus, it was error to admit it. And because Sylvia's second statement is inadmissible, her first statement is also inadmissible.

And admitting Sylvia's statements was not harmless. A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that a reasonable jury would reach the same verdict had the error not occurred. *State v. Easter,* 130 Wn .2d 228, 242, 922 P.2d 1285 (1996). Here, Sylvia's second statement refutes Michael's claim of self-defense, because Sylvia said that Lee may have reached in his pocket after Michael stabbed him. And the State wanted to admit the second statement not to show that Sylvia's statements were the 'truth,' but

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A: I think so, but I'm not positive.

Q: Okay, when you think so, what do you mean by that?

A: I coulda swore I seen him goin' for somethin' before, right before everything happened. He was like reachin', fiddlin' around down here and stuff . . . and I just . . . I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut . . . but I'm not positive. I, I my mind goes blank when things like this happen. I mean, I just, I remember things wrong, I remember things that just doesn't, don't make sense to me later. Ex. 44 at 7.

to show that Michael is a person who lies and would get the person closest to him, Sylvia, to lie in the first statement. The overwhelming message is that the jury cannot trust Michael's story. There is a reasonable doubt that the jury would have reached the same verdict in the absence of Sylvia's statements; thus, admitting the statements was reversible error.

3. *Lilly v. Virginia*

Crawford argues that the U.S. Supreme Court's decision in *Lilly v. Virginia,* 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999), requires exclusion of Sylvia's out-of-court statements. In *Lilly,* the Court determined that the admission of a non-testifying accomplice's confession violated the defendant's Sixth Amendment right of confrontation. *Lilly,* 527 U.S. at 139. The Virginia court had admitted the confession on the ground that it satisfied Virginia's statement against penal interest exception to the hearsay rule. *Lilly,* 527 U.S. at 122. A plurality of four justices found that accomplices' confessions are not within a firmly rooted exception to the confrontation clause. *Lilly,* 527 U.S. at 134. Turning then to the "residual trustworthiness test" of the confrontation clause – whether the statement has "particularized guarantees of trustworthiness" – the plurality was unconvinced that the accomplice's confession was sufficiently reliable to be admitted without opportunity for cross-examination. *Lilly,* 527 U.S. at 137-38.

Lilly is on point in this case. In *Lilly,* the disputed statement did not fall under a firmly rooted hearsay exception, nor did it meet the Sixth Amendment's "residual trustworthiness test." Here, neither of Sylvia's

statements survives a confrontation clause challenge under the Sixth Amendment's "residual trustworthiness test" or under a firmly rooted hearsay exception. Thus, *Lilly* requires exclusion of both Sylvia's statements.

Reversed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

HOUGHTON, J., concurs.

ARMSTRONG, C.J. (dissenting).

I agree with the majority that the court erred in admitting those parts of Sylvia's statement that were not inculpatory.[3] But I disagree with the majority's conclusion that no part of Sylvia's second statement is admissible. Because Sylvia's second statement is the same as Michael's second statement in all important aspects, I believe the trial court properly admitted her statement as an interlocking confession under *State v. Rice,* 120 Wn.2d 549, 844 P.2d 416 (1993).

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[3] But it was harmless error. Michael objects to Sylvia's statements that he was "infuriated," "enraged," and "past tipsy," and that he said Lee "deserves a ass whoopin'." Ex. 42 at 4. The jury heard a tape of Michael's own statements to police in which he said he wanted to "kick [Lee's] ass," and that on the day of the stabbing he was "mad, mad . . . mad enough to go find [Lee]." Ex. 44 at 3. Thus, the jury would have reached its same verdict even if the trial court had excluded the non-inculpatory parts of Sylvia's statement; admitting them was harmless error.

The majority finds that Sylvia's and Michael's second statements differ in whether the victim, Lee, reached for something before or after Michael stabbed him. I disagree. Both said that Lee may have reached for something before or during the stabbing. Sylvia said Lee put his hand over his head, "put his hands in his . . . put his right hand in his right pocket . . . took a step back . . . Michael proceeded to stab him. . . ." Ex. 42 at 7. Michael said, "I could a swore I seen him goin' for somethin' before, right before everything happened." Ex. 44 at 7. Thus, the statements, although vague, are essentially the same on the critical question of whether Michael acted in self-defense. Moreover, neither Michael nor Sylvia mentioned Lee reaching for something until police raised the possibility that Lee was armed. Michael's statement is reliable because he was motivated to put the best light possible on his conduct. And Sylvia's statement is reliable because she too was motivated to put the best light possible on Michael's conduct. Yet neither could offer more than that the victim may have reached for something immediately before the stabbing.

Whether or not Lee was armed is certainly critical to Michael's claim of self-defense. But any dissimilarity in the Crawfords' statements regarding Lee being armed is minor. The majority confuses these two considerations and wrongly concludes that because the statements are slightly dissimilar on a critical issue, there is a critical difference between the statements. I disagree.

Moreover, even if we read Sylvia's statement as reporting that Lee reached for something after the stabbing, the statements are still the same in one essential fact: neither Michael nor Sylvia clearly stated that Lee had a weapon in hand from which Michael was simply

defending himself. And it is this omission by both that interlocks the statements and makes Sylvia's statement reliable.

In conclusion, I would hold Sylvia's statement was properly admitted because it interlocks with Michael's statement.

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

STATE OF WASHINGTON, Plaintiff, vs. MICHAEL D. CRAWFORD, Defendant.	)	No. 99-1-1205-8 71683-8

VERBATIM REPORT OF PROCEEDINGS

(Filed Apr. 10, 2000)

BE IT REMEMBERED that on October 18, 1999, the above-entitled and numbered cause came on for hearing before the HONORABLE RICHARD A. STROPHY, Judge of Thurston County Superior Court.

APPEARANCES OF COUNSEL:

For the Plaintiff State of Washington	ROBERT LUND Prosecuting Attorney's Office 2000 Lakeridge Dr., SW, Bldg. 2 Olympia, WA 98502
For the Defendant	HUGH J. McGAVICK 2415 Pacific Avenue, Suite A Olympia, WA 98502

REPORTED BY: Aurora J. Shackell, Official Court Reporter C.S.R. No. SHACKAJ334KD

* * *

[7] THE COURT: All right. Your first motion in limine seeks a ruling that the defendant's wife is incompetent to testify because of her spousal privilege under RCW

5.60.060. Does the State intend to call [8] Ms. Crawford, I believe it's Sylvia Crawford, as a witness?

MR. LUND: Yes, Your Honor. We did subpoena Ms. Crawford, didn't list her on our witness list, and would call her if she were available.

MR. McGAVICK: And she does intend to invoke her spousal privilege to remain silent.

THE COURT: The State intends to call her as a witness in chief?

MR. LUND: Yes.

THE COURT: What is the – what offer of proof or summary can you give me of her intended testimony?

MR. LUND: Your Honor, what she would testify to is that she was present when the stabbing of Mr. Lee took place. She had gone there specifically with the defendant to show him where Mr. Lee lived so that Mr. Lee could, quote, kick his ass. She would also testify with regard to statements that she gave to the police. She gave three statements to the police. First was to Officer Don Heinze which was not a recorded statement. In that statement, she told Officer Heinze that she had been at Kenneth Lee's house that day with her husband, Michael Crawford, that the three of them were drinking alcohol, that Michael left [9] to go to the liquor store, that while she was gone, that Lee made unwanted physical advances toward her, that he laid on her, that he tried to kiss her, that he was trying to pull her clothes off, and that Michael came back, heard her screaming and was pounding on the door, that Mr. Lee got up off of her, went to the door, let him in, and that Michael started screaming and stabbed Mr. Lee. That's the first statement she gave to Officer

Heinze. Later, she was interviewed at OPD by Detective Gies, and she indicated pretty much the same story.

At OPD, Mr. Michael Crawford was also interviewed and gave a similar statement to hers, although there were several inconsistencies between the first tape-recorded statement given by Sylvia and the first tape-recorded statement given by Michael. That prompted the detectives – the second time, the interviewer was Sergeant Jim Costa, interviewed Sylvia. At that time, she admitted that she had been – had given a false statement, a deceptive statement to the police with regard to this supposed sexual assault by Mr. Lee. She said it hadn't happened this particular day, the day of August 5th, that it really had taken place some several weeks previously, maybe four weeks prior, and that her husband really had not been there [10] when it took place, that it was some other individual. And she went on to say that she and her husband had been at, I think, Sylvester Park, that they had been with some friends drinking, that the subject of Mr. Lee came up, that the defendant had become upset thinking about how Mr. Lee had allegedly made these unwanted advances towards his wife, and that Mr. Crawford wanted his wife, Sylvia, to take him to Mr. Lee's house so he could assault him. And she – because Mr. Crawford had never been to Mr. Lee's house, didn't know where he lived, Cynthia – or Sylvia Crawford, therefore, took him – escorted him to Mr. Lee's apartment, knowing that an assault was going to take place, was imminent, and they went there, and the assault did take place.

That's a thumbnail sketch, Your Honor, of what I understand from reviewing the police reports and her tape-recorded statements that she had indicated to the police.

THE COURT: Mr. McGavick.

MR. McGAVICK: Thank you, Your Honor. The statements offered by – first of all, I don't think there's a question, but that Ms. – Mrs. Crawford has the right to invoke this privilege, which she's doing. So I think we're on point number two, and that's the admissibility of her out-of-court statements to police. [11] There were three different statements. Those are inadmissible, because of the unavailability of this witness. And the most recent U.S. Supreme Court case from June 10th, '99, is *Lilly v. Virginia,* which held that in a situation similar to this – there were three folks who were accused of involvement of crime. One gave a statement, exercised his Fifth Amendment right to refuse to testify. The defendant, who was on trial, protested that he was denied his Sixth Amendment right of confrontation because of the absence of this speaker, and the U.S. Supreme Court stated that the confrontation clause did overrule – or did require that in order for that to be used against him – that it would be improper to use that against him.

It's also here – it's being offered to prove the truth of the matter asserted under no well-rooted, firmly-established exception to the hearsay rule. They are trying to show that Michael Crawford went over there to kick Kenneth Lee's ass, as they say, and to show his state of mind. There is no – no good basis for this.

The Supreme Court's concluding paragraph of *Lilly vs. Miller* [sic] – and I'm sorry. I just have a printed sheet which just has blank U.S. blank. At page 21 of their opinion, they state, "The admission of the [12] untested confession of Mark Lilly violated petitioner's confrontation clause rights adhering to our general custom of allowing

state courts initially to assess the affected erroneously admitted evidence. In light of substantive state criminal law, we leave it to the Virginia courts to consider in the first instance whether the Sixth Amendment error was harmless beyond a reasonable doubt." And they gave a couple of citations. "Accordingly, judgment of the Supreme Court of Virginia is reversed and the case is remanded for further proceedings."

THE COURT: That involved a spouse's testimony?

MR. McGAVICK: No, but it was a brother who exercised – he was unavailable because he exercised his Fifth Amendment privilege against self-incrimination on the witness stand. So it's not the identical privilege. It still is a privilege that denied the defendant his confrontation clause, right to confront his accusers.

And in that case, they stated a statement against penal interest is not an exception to the hearsay rule. That trumps the defendant's confrontation clause, right to confront his accuser in court in front of the trier of fact.

[13] THE COURT: Well, I don't have a cite to that case. It hasn't been – I haven't been provided a slip opinion. I don't know how to analyze it until I have a chance to see it.

MR. McGAVICK: I will make a copy as soon as court recesses and bring it to chambers, Your Honor.

THE COURT: The difficulty – well, my understanding of 5.60.060 is that it has two aspects to it: One, the competency issue, whether or not a spouse is ever competent to testify against another spouse; and the second is the privilege issue. The statute reads that a wife

shall not be examined for or against a husband without consent of the husband, nor can either during the marriage or afterward be without consent of the other examined as to any communication made by one to the other during the marriage. This exception shall not apply to criminal action or proceeding for a crime committed by one against the other. That's not the case here. Nor to a criminal action or proceeding against the spouse if the marriage occurred subsequent to the filing of formal charges. That didn't occur. Nor to a criminal action or proceeding for a crime committed by said husband or wife against any child.

So it appears that, even though, theoretically, a [14] husband and wife are involved in a criminal act as either co-conspirators or coprinciples [sic] and both of them give statements to police, they cannot be examined pursuant to their statements on the witness stand against the other.

Do both counsel concede that?

MR. LUND: I think that's the case, Your Honor.

MR. McGAVICK: Yes.

THE COURT: All right. That being conceded, then the other issue is whether or not, in view of that, the right of confrontation would be offended if extra-judicial statements made by one spouse about that spouse's own conduct or the conduct of the other spouse that had to do with the criminal act can be admitted against the non-declarant spouse pursuant to an exception to the hearsay rule.

You have indicated that you believe the *Lilly* case, which I don't have a copy of, calls into question whether or not that would be, if not a violation of the hearsay rule,

given the State's rule of evidence and application of hearsay rules would permit it, i.e., constitute a violation of the right to cross-examination, the Sixth Amendment right to effectively cross-examine. I have heard your argument, [15] Mr. McGavick. I'd like to hear further argument from the State.

MR. LUND: Your Honor, the State disagrees with Mr. McGavick's analysis here. First of all, with regard to Evidence Rule 801, statements made in furtherance of a conspiracy are not hearsay. They're not even hearsay. We don't have to worry about whether they fall into any firmly-rooted exception. They're not considered to be hearsay. And here, Sylvia Crawford knew that Michael Crawford was going to assault Kenneth Lee. She knew that Michael Crawford didn't know where Mr. Lee lived. She knew that by taking him, meaning Michael, to Mr. Lee's apartment, she would be facilitating that criminal act taking place. She is a co-conspirator. And the statements she talked to the police about were how she and Michael conversed about how – where Mr. Lee lived, where they went looking for him. So she's made statements about the conspiracy, how the conspiracy was furthered. So we have one way they're admissible under Evidence Rule 801.

The second is she – when she makes the statement to the police and comes clean about what had happened in terms of helping out with this assault, she's making that statement against her own penal interest, which is [16] an exception to the rule against hearsay under Evidence Rule 804. She also by making that admission admits that she deceived the police in an attempt to cover up Mr. Crawford's crime on a class A felony, which means that she has just admitted culpability to a class C felony, rendering criminal assistance in the first degree. And so the only –

the only consideration, then, is: Are her statements sufficiently reliable enough that Your Honor should admit them? And where the Court should turn there is the case of *State vs. Ryan,* which set forth several factors to determine reliability of these type of statements. And I apologize to the court, I haven't cited *Ryan* but will provide it to Your Honor.

THE COURT: Well, defense cited *Ryan.*

MR. LUND: Okay. They have the nine factors there. Did you set them out, Hue, in your brief?

MR. McGAVICK: They're not set out in full.

MR. LUND: But, Your Honor, the principle concern that *Ryan* has is – one of the principal concerns is the statement that was made by the person close in time to the event, such that it's reliable. Sylvia Crawford makes her statement to the police the same day, just a short period of time after she and Michael are picked up in downtown Olympia. So we have [17] recency [sic] is sufficient. The other is: Does she have motivation to misrepresent? She doesn't. Clearly, she says to the cops when they ask her to come down to the station, they say, will you come down to give a statement? She said, I will be happy to if it will help Michael. This is her husband. She loves him. She doesn't want to make any statements that are going to jam him up and dig a bigger hole for him. And so that provides great reliability to her statements and what Your Honor ought to consider in determining the reliability.

Another factor in *Ryan* is: Are the statements against her interest? I've already covered how they're against her penal interest. I don't have all the factors in front of me,

but I think if the Court does a *Ryan* analysis, it will determine that all or nearly all of those factors are satisfied in terms of the reliability of the statements she made. And I would further add that Mr. Michael Crawford himself gives a second statement to the police where he corroborates what she said. He says the same thing. He admits, yeah, when confronted by the detective, that is true, we did falsify that initial story. We weren't really there at his house drinking. The rape thing didn't really happen today. It happened before. Yeah, I was [18] pissed off. I was going to kick his ass. Sylvia did take, me over there and show me where it was. So he adopts her statement. So that's further corroboration for the reliability of that statement.

So everything is there for these statements to be admitted, and they should be admitted as substantive evidence. But as I mention in my brief, even if they're not admitted as substantive evidence, they absolutely need to be admitted so the jury understands how this investigation took place, why it is that the detectives had to bring Mr. Crawford back again for additional examination and why they had to focus on specific points, because they learned them from Sylvia. Because even if they aren't admitted as substantive evidence, the case I cited to the court, which was *State vs. Diana,* I believe, that clearly sets forth they're admitted for other purposes to show, you know, the state of mind of the third party in relying on it. In this case, it would be the detectives. But I think it's substantive evidence that's admissible.

THE COURT: Any rebuttal, Mr. McGavick?

MR. McGAVICK: Yeah, very briefly. Thank you, Your Honor. In furtherance of conspiracy is not a hearsay

exception, but it is a statement against penal interest. And I'm going to refer to the *Lilly* case [19] again. I know the Court is not familiar with that intimately, but that was a case where there were two brothers, Mr. Lilly and Mr. Lilly and a third fellow, a roommate of theirs, who broke into a house, stole, I think, nine bottles of liquor, three firearms and a safe. The next day, they engaged in a robbery. They discharged the weapons at some youths, I think, and were arrested. One of the Lilly boys gave a confession which was sought to be introduced against his brother who was going to trial. They were clearly involved in a conspiracy by any standard, at least the equal of what is being alleged here that Sylvia and Michael Crawford were engaged in.

The confrontational clause precluded use of his out-of-court – self-serving out-of-court statement that incriminated his brother because he was not available to confront. The same analysis applies here. I disagree with the prosecutor's assertion to the Court that the statements represent that Mr. Crawford went there to assault Mr. Lilly. The statements show that he went there to confront Mr. Lee. The statements of Sylvia and Michael –

MR. LUND: Your Honor, if I could just interject, the statements in both statements use the phrase "Kick his ass." That is what is said in the [20] tape-recorded statements. Isn't that right, Mr. McGavick?

MR. McGAVICK: Tell you what . . . I won't interrupt you if you won't interrupt me.

MR. LUND: I just wanted to clarify one point. We're in agreement?

THE COURT: I don't want counsel to engage in colloquy between each other. If there is an objection by one side or the other, make your objections, state your ground.

MR. LUND: My apologies to counsel and the Court.

MR. McGAVICK: Likewise. Next, close in time, these were not excited utterances. These – they had a chance to flee the scene. They were apprehended. They were questioned. They were questioned – she was questioned three times. Michael Crawford did give a second statement which the jurors will hear much about his first and second statements, and her statements don't need to go to the jury. They are being offered to prove the truth of the matter asserted, that Crawford went there to kick his ass. They're being offered to prove that he had an intent to assault or attempt to murder Mr. Lee, and they're impermissible for those reasons because they don't satisfy anything [21] sufficient to defeat the purpose of the confrontation clause.

THE COURT: I don't know how long these statements are and whether or not you have clean copies of – bench copies of each of the statements that you are seeking to admit in lieu of testimony of the witness. Can I be provided those this evening?

MR. LUND: Absolutely, Your Honor, yeah.

THE COURT: All right. I'm going to – I would like from the defense either a citation or copy of the slip opinion of the *Lilly* case. And from the prosecution, I would like copies of the two statements and a xerox of the *Ryan* case.

MR. LUND: Absolutely.

THE COURT: Forget the *Ryan* case. I can access that. Let's turn our attention to the other aspect of the defense motion in limine.

* * *

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
MICHAEL D. CRAWFORD,
Defendant.

No. 99-1-1205-8
VOLUME II

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on October 19, 1999, the above-entitled and numbered cause came on for hearing before the HONORABLE RICHARD A. STROPHY, Judge of Thurston County Superior Court.

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REPORTED BY: Aurora J. Shackell, Official Court Reporter
C.S.R. No. SHACKAJ334KD

[37] THE COURT: After selection of the jury, the parties argued their respective motions in limine, and the Court took under advisement and deferred ruling on the

issue raised in the defense motion in limine to, in essence, preclude the State from introducing and admitting into evidence before the jury the defendant wife's testimony because of the spousal privilege under RCW 5.60.060.

The defense contended that Sylvia Crawford's out-of-court statements to the police were inadmissible pursuant to that statute and likewise inadmissible because of defendant's confrontation rights guaranteed by the U.S. and State's constitution. In argument, the defense cited *Lilly vs. Virginia*, decided June 10th, 1999, Justice Stevens delivering the opinion for the rather fractured but nevertheless apparently majority of the court.

The State argued that State Supreme Court decisions, namely, *State vs. Burden*, *State vs. Diana*, [38] allow the admission of such extra-Judicial or out-of-court statements by defendant's wife to arresting officers regarding what occurred.

The Court has analyzed the authorities cited, the evidence rule. At the heart of the State's position is the State's contention that the statements made by Ms. Crawford – there were two of them, and the State kindly provided the Court with the first statement given to Detective Gies by Sylvia Crawford at 7:03 p.m. August 5th, and the second statement given by Sylvia Crawford to Detective Sergeant Costa, which was at 2243 hours or 10:43 p.m. that same day. The State also supplied transcripts of statements made by the defendant, Michael Crawford, first to Detectives Gies and Costa at 8:00 p.m., and the second statement to Detective Gies and Costa at 45 minutes past midnight the morning of August 6th. I've reviewed those statements as well as an officer's report of Officer D. Heinze, who apparently was the first to confront

defendant and his wife, Sylvia, after the alleged assault, and he and officer Allen and Officer Dale in combination effected the arrest of the two individuals in downtown Olympia not too long after the alleged stabbing incident. I don't know what the exact time of arrest was.

[39] So prosecution argues that the statement of Sylvia Crawford is a statement against her penal interest because in those statements, she indicates her presence and that she had been at the scene at the time of the stabbing and ultimately in both the first and second taped statements given at 7:03 p.m. and 10:43 p.m. respectively, she opines that her first claim that her husband was defending her against an unwanted sexual advance by the alleged victim, Mr. Lee, during and shortly after Mr. Lee's attempted sexual advances on Sylvia Crawford provoked and prompted the stabbing. She opines that that first claim was not true and that really what happened was that a month or so – a number or [sic] weeks or up to a month before, while separated from her husband, she was at the Lee residence with another and when that other went to get beer. Mr. Lee attempted to force his sexual intentions on her, and that altercation was interrupted by this second individual returning from the beer store. And when she informed her husband with whom she was subsequently reconciling, in fact on the day or shortly before the day of this incident, which allegedly occurred on the 5th of August, she advised her husband of such, and her husband was angry, her husband being the defendant, and wanted to quote, "Kick some ass," regarding Mr. Lee but [40] did not know where Mr. Lee lived. So she took him to Mr. Lee's apartment and that there – she further states that there was some discussion regarding money owed,

and then there was an altercation wherein Mr. Lee was stabbed, she believed, three times by her husband.

Mr. Crawford's first statement parallels the wife's first statement. Mr. Crawford's second statement parallels the wife's second statement in that he admits there was no attempted sexual advances by Mr. Lee against Mrs. Crawford, Sylvia Crawford, on the date in question, but that he had learned about the attempted sexual advance from his wife shortly before going on August 5th to Mr. Lee's apartment with his wife, Sylvia, that he was mad about it and that he had thought prior to going there about kicking Mr. Lee's ass, to use the defendant's phraseology, and further had claimed to police in a second statement that he believed – he was aware of the fact that from past contacts and associations, Mr. Lee owed him money, and there was a discussion about money and there was argument and he believes he stabbed Mr. Lee. He says he stabbed Mr. Lee then are some mind games about whether or not he as opposed to perhaps Sylvia stabbed Mr. Lee, rather difficult for the Court to understand where that was going. But, in any event, ultimately, [41] his knife was – admitted that his knife was the weapon used to stab Mr. Lee and that he, the defendant, never gave his knife to his wife, that Mr. Lee was stabbed at least twice and that the defendant, Michael Crawford, had a cut on his right hand that took 12 stitches to close, and he's not exactly sure how he got that cut. But during the course of the jawing back and forth, he thought Mr. Lee was taking something from his pocket or reaching for something.

Mrs. Crawford never saw anything in Mr. Lee's hand and says in her second statement that after being stabbed, Mr. Lee's hands and arms were spread out wide and his hands were open, there was nothing in his hands, and he

fell to the floor. On the tape that the Court heard, the 911 tape, within moments after the stabbing, Mr. Lee had called 911 for assistance and the Court has heard a portion of his attempt to get help through 911 dispatcher wherein Mr. Lee indicates that two people came to his door and they said something about money and he was stabbed, and after a fashion, he was able to remember their names as Mike and Sylvia.

It is in that context that the Court analyzes the citations of authority and the evidence rules in play here, as well as the statute that has been cited. First of all, the parties have conceded that five – [42] that there is no issue as to privilege in that – or competency in that the wife is not being called to testify. The issue is whether or not the marital privilege under the state statute is offended by introduction of the wife's statement.

I have reviewed carefully *State vs. Burden* and *State vs. Diana*, principally *State vs. Burden*. In that case, the marital privilege was not in issue, or the marital communications privilege was not in issue. In the *Burden* case, the defendant was charged with multiple counts of theft, possession of stolen property and other property offenses, and during the course of the investigation of his crimes, the police became aware of inculpatory statements by Mary Burden to third persons, including statements to her pastor, her brother, Kitsap County police officers and department store cashiers. On defense motion, the trial court granted a motion ruling testimonial privilege barred admission of such testimony to others. The supreme court reversed the trial court upon certification of the issue from the court of appeals. And in *State vs. Burden*, a 1992 decision written by Justice Dolliver, the Supreme Court stated that it rejected the defendant's assertion that

admission of Mary Burden's extra-judicial statements to others, third persons, [43] would indirectly violate the testimonial privilege and place the defendant in a position of having to waive the privilege to refute the testimony of the wife.

The court, in essence, found that the purpose of the testimonial privilege is to foster domestic harmony and prevent marital discord, prevents repugnance of having one spouse testify against the other, and prevents testifying spouse from having to choose between perjury and contempt of court or jeopardizing the marriage. The Supreme Court in *Burden* found the latter two purposes of the testimonial privilege not to be affected by allowing a third person to testify because the spouse is not testifying in court. The *Burden* court stated that there, it was not a case where the prosecution called a spouse to the stand. The spouse had testified under those circumstances, that common law rule would be violated. However, not calling the spouse to the stand but having a third person testify as to the spouse's statements is one step removed from actual testimony by the spouse, and, therefore, there is no chance that the Court might be repulsed by a spouse actually testifying by his or her mate. There's, therefore, no chance that marital frictions will be aggravated, for there is a convenient buffer of a third person actually making the remarks [44] pursuant to testimony.

The Court noted the marital privilege and the rationale behind it has been extensively criticized as lacking modern justification. Although the ability of the privilege is not itself at issue, the Supreme Court was not convinced that the marital harmony rationale justifies a construction of RCW 5.60.060 which excludes third-person testimony of spousal extra-judicial statements. The court concluded

that privileges are narrowly construed to serve their purposes so as to exclude the least amount of relevant evidence. So the Court views the statutory privilege reflecting common law as one that is narrowly construed so as to exclude the least amount of relevant evidence, and the Court quoted from federal cases that a person holds no privilege to prevent his or her spouse from making adverse statements abroad in the world, and if this occurs and revealed by a third person is the facts of the conduct of the spouse, not the advent of the trial, which is the source of any strain upon the marriage, when a marriage is deteriorated to the point where one spouse makes statements damaging to the other, that marriage will usually proceed to its fate regardless of how the spousal privilege is or is not applied.

So, in essence, with that rationale behind [45] analysis of this circumstance now before the Court, conclude that to introduce the statements of Sylvia Crawford given to third persons, namely, detectives arresting officers, would not be a violation of the marital privilege statute, and, accordingly, on that basis, the Court does not believe that the defense motion in limine is persuasive.

However, that does not end the inquiry. The second prong of defense objection to the statements is that if somehow it's not a violation of the marital privilege to introduce those statements, it's certainly a violation of the defendant's confrontation rights because the statement cannot be cross-examined. And defense relies on *Lilly vs. Virginia*. In *Lilly vs. Virginia*, the U.S. Supreme Court was reviewing the Virginia Supreme Court's admission at trial against a defendant in a homicide and other charged case, robbery and theft case of one brother's statement against another. The Virginia court held that for all purposes,

statements against penal interest were admissible, sufficiently reliable and as sufficiently rooted in a firmly-rooted hearsay exception, namely, against penal interest.

The Supreme Court disagreed. The Supreme Court held, in essence, that the confrontation clause ensures [46] the reliability of evidence against a defendant by subjecting it to rigorous testing in an adversary proceeding, such as by cross-examination of the declarant.

Here, statements are sufficiently dependable to allow their untested admission, that is, admission without cross-examination against an accused, only when the statements fall within a, quote, firmly-rooted hearsay exception, or they contain particularized guarantees of trustworthiness, such that an adversary would expect to add little, if anything, to their reliability. The Court went on to then trace the development of the firmly rooted hearsay exception rationale regarding statements against penal interest, concluded that a statement merely against penal interest defines too large a class to meaningful confrontation clause review. The Court then went on to reflect that statements which include statements of co-defendants, which shift their primary focus to the culpability to the co-defendant, the accused brother in the case, encompasses statements that are presumptively, given the history of this firmly-rooted exception evolution, unreliable, presumptively unreliable when the accomplice incriminates himself together with the defendant. Accomplice statements [47] that shift or spread blame to a criminal defendant, therefore, fall outside the realm of those hearsay exceptions that are so trustworthy that an adversarial testing can be expected to add little to the statement's reliability.

In the *Lilly* case, the declarant brother was in custody for his involvement in and knowledge of serious crimes. He made his statement under governmental authority supervision, was primarily responding to officer's leading questions and also had a natural motive to exculpate himself with respect to the most serious of the charges he was facing, ranging from theft to robbery to homicide and kidnap, and was under influence of alcohol during the interrogation. Those factors militated against the finding that his statement was so inherently reliable that cross-examination would have been useless or superfluous.

Not only were the confessions, incriminating portions, not a declaration against penal interest in regard to the homicide, but these statements were a part of the custodial confessions of the sort that this court has viewed with special suspicion given a co-defendant's strong motivation to implicate a defendant at trial and exonerate himself.

[48] So it's in that light that the Supreme Court in *Lilly* held that hearsay exception is firmly rooted if, in light of longstanding judicial and legislative experience, it rests on such a solid foundation that admission of virtually any evidence within it comports with the substance of the constitutional protection. This standard is designed to allow the introduction of statements falling within a category of hearsay whose conditions have proven over time to remove all temptation to a falsehood and to enforce as strict an adherence to the truth as would the obligation of an oath and cross-examination at trial.

So, in essence, the U.S. Supreme Court reversed Virginia Supreme Court's holding that any statement against penal interest is admissible, because it's a firmly-rooted exception to the hearsay rule. The Supreme Court

went on to discuss how one would analyze this third category of hearsay statements that they deemed inherently unreliable, that is, a confession by an accomplice which incriminates a criminal defendant. First, the Court distinguishes and looks at the statement as a whole and distinguishes whether or not the accomplice's confession inculpates themselves and the accused or exculpates themselves and inculpates the accused regarding the more serious of the offenses to [49] which the declarant is confessing. The Court reviewed the Crawford decision where the U.S. Supreme Court stated that even when an alleged accomplice testifying his confession that incriminates himself together with the defendant, ought to be received with suspicion and with the very greatest care and caution and ought to be passed upon by the jury in the same rules governing other and apparently other credible witnesses.

The admission of non-testifying accomplices' confession which shifted responsibility and implicated the defendant as the triggerman plainly denied the right of cross-examination secured by the confrontation clause of the U.S. constitution in *Douglas vs. Alabama*. The Court further opined that accomplice confessions ordinarily are untrustworthy precisely because they're not unambiguously adverse to the penal interest the declarant, but instead are an attempt to minimize the declarant culpability. "We once again noted in *Williamson vs. United States*," says our U.S. Supreme Court, "the presumptive unreliability of the non-self-inculpatory portions of the statement. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.

So the key problem before me, when I analyze the [50] statements of Sylvia Crawford, is to determine whether or not her statements were against her penal interest in the context that the Court consider a firmly-rooted exception to the hearsay rule, and, that is, was her statement primarily against her penal interest. When court can be confident, as in the context of hearsay falling within a firmly-rooted exception, that the declarant truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility. The Sixth Amendment's residual trustworthiness test allows admission of the declarant statement.

So my mission is to determine whether or not the context of her statements falls within a firmly-rooted exception. In other words, is her truthfulness so clear from the surrounding circumstances that the test of cross-examination would be of marginal usefulness? If I can conclude that, then the Sixth Amendment's residual trustworthiness test would allow admission of a declarant potential co-defendant confession.

Here, I have the wife of the defendant who says to the police, look, I'll talk to you, I'll do anything to help my husband. So her intent at least superficially is to help her husband. It's not to exculpate herself and inculpate him. How does she attempt to help her [51] husband, arguably? By first saying that her husband was confronted with her being assaulted by Mr. Lee and went to her defense and a confrontation ended up in a stabbing. Then she changes and says, no, it didn't happen that way when confronted by police with the fact with what she's saying is somehow inconsistent with what her husband is saying. And she says, no, we went there, my husband was upset, there was an argument, there was a stabbing. My husband was

upset because I told him that Mr. Lee had in the past approximately a month earlier made unwanted sexual advances against me, and, therefore, disrespected me and breached the trust of friendship.

Mr. Crawford gave statements much to the same effect. So what is there that would be of benefit by cross-examination? The statements are fairly parallel. The statement is, in essence, against Ms. Crawford's penal interest because she was present under the first version and assisted Mr. Crawford to get away under that version. Her statement is against her penal interest in that, given the second version, she agreed to show the defendant where Mr. Lee lived so the defendant could confront Mr. Lee because of his anger at what she claimed Mr. Lee had done to her or with her, and she assisted her husband thereafter. Is the [52] thrust of her statement an attempt to shift blame, exculpate herself and inculpate the defendant?

I find and conclude that that's not demonstrated here. If anything, my assessment of her statement is she thinks Mr. Lee under either version had it coming, and even says words to that effect about the matter at one point. I can't recall exactly when.

So when I take the statement of Sylvia Crawford in the context of the statement of the Defendant Crawford, I do not find that it is unreliable and untrustworthy. It's not dissimilar to the defendant's own statement. When I take it in a vacuum, not measured against any other evidence known at the time or understood at the time, I think it's a closer call. And given, I believe, *Ryan,* if not *Ryan,* the other commentary in *State vs. Burden* and *State vs. Diana*, the statement as a whole comes in whether part of it is

exculpatory or inculpatory or favorable or unfavorable to the declarant.

In light of my analysis, it is my suggestion that the way to avoid the potential for error on review would be for the State not to offer the wife's statement in its case in chief, since the defense has listed the wife as its witness. If the defense offers her testimony, she can be confronted not only in [53] cross-examination regarding her direct testimony, but with what she had said or not said in her statement, both statements one and two.

If the wife does not testify, the State has certainly the statements of the husband, as well as the direct eyewitness testimony of Mr. Lee, the alleged victim. In fact, the statement of the husband might arguably not even be necessary, given Mr. Lee's – what I anticipate would be his direct testimony, and that it would be for the defense to explain it. Well, without going further, I am concluding, given my analysis of the statements and the standard set forth in *Lilly vs. Virginia,* that the type of potential accomplice statement against penal interest made by Sylvia Crawford is sufficiently reliable concerning what occurred at the time of the stabbing and with respect to who stabbed Mr. Lee that I would not preclude the State from attempting to admit it in its case in chief.

And so that is my ruling, in essence, with some dicta, as I have suggested so as a way to avoid the appellate issue that would be raised by application of *Lilly vs. Virginia*.

Either counsel have questions regarding my ruling?

[54] MR. LUND: Not with regard to that ruling.

MR. McGAVICK: Yeah, I do, Your Honor. Thank you. Neither side identified to the jury when they read the list of witnesses the name of Sylvia Crawford, and she is on the written list. But based upon what the parties discussed

THE COURT: I might have misunderstood you when you listed your witness. I was glancing at your list of witness, and I thought you said her name as well.

MR. McGAVICK: Her name is on there. I explicitly did not read it. I jumped over that.

THE COURT: I may have missed that.

MR. McGAVICK: The State did not read her name, I believe.

MR. LUND: I did not.

MR. McGAVICK: Based on 5.60.060(1), the first part of our motion in limine, we agreed she has a right to invoke that. The jury has not been told she's coming. I'm unclear about the scope of your ruling in light of the fact that she is to invoke her marital spousal privilege. Does that have any bearing on your ruling?

THE COURT: I don't understand your question. I saw her on the list of witnesses. I [55] thought she was named. My suggestion was, by way of dicta, one way out of the issue of error it for the State to reserve use of her statement at all and see if she testifies as it appears she would be, given the fact she was listed.

Now, if she doesn't testify, the State doesn't use the statement, has plenty of other evidence, from one point of analysis, then there's no issue. If she does testify, her

statements can be used to cross-examine her by the State and be referred to in cross-examination and there's no offense against the confrontation clause because she's there.

MR. McGAVICK: Right.

THE COURT: That's the easiest way, from this Court's view, to avoid any potential issue and error. But since the State has pursued introduction in its case in chief of the statements, you have objected on the basis of *Lilly*. I've analyzed *Lilly* and analyzed the circumstance of the statement, and I have not found, although I have indicated I believe it was a closer issue than I earlier anticipated, that her statement was so unreliable that it would offend the analysis of *Lilly* and that's because it's consistent with regard to her involvement in both cases, with the exception of the timing of the alleged unwanted sexual [56] advances. It's consistent with what she said all three ways. It's given in the context of her desire to help her husband and explain basically that, in effect, from her point of view, Lee had it coming, or something coming in the nature of a, quote, "ass kicking", and so it doesn't tend to primarily be for the purpose of shifting blame from her to the husband. And when I consider that in light of what the husband says, basically, that he stabbed the victim and his knife was used to stab, although he claims some anticipation maybe the alleged victim had a knife, that's not inconsistent.

So, to me, cross-examination of Ms. Crawford would add little because the defense of Mr. Crawford is not that he didn't do it, but that he did it in either self-defense or defense of his wife, which is what I understood from you in your questions on voir dire and in your comments thus far.

So if I've got to make the call, I'm ruling it admissible, and I'm throwing out an alternative to the State to avoid pressing the issue, but I don't try the State's case. I don't try the defense case.

MR. McGAVICK: Sure. I appreciate that, Your Honor. May I address a couple of points that I would like to bring to the Court's attention to clarify this?

[57] THE COURT: Yes.

MR. McGAVICK: We have sought to exclude any reference to these statements as a whole. I believe I understand the Court's logic, and I appreciate the time and consideration you've given to this lengthy confusing U.S. Supreme Court case and all of the transcripts of the statements which you've thoroughly reviewed and grasped.

There are two parts in here where I think if you're going to let any of it in, you should sanitize the two parts where she's speculating about her husband's state of mind. And one of those you've referred to, and she's saying at page four of eight, if you have her second statement there . . .

THE COURT: I have page four of eight.

MR. McGAVICK: Down about the middle where the answer begins with pausing, that's where the – in the third line of that answer about the middle of the page, "Mike, he's like, yeah, that dude deserves an ass-whooping," you know. And there's a statement which certainly is not in furtherance of getting her husband off. There's a statement that's certainly not looking out for his best interests, certainly not a statement to help him. And then if you go to page six of eight of Sylvia's second

statement, her first answer there is [58] evidence the State will be attempting to rely on if this is admitted to establish the state of mind of Michael Crawford, which she is surmising what his intentions were. And that says at page six of eight, the first answer towards the bottom, "So I think that as far as that goes, he was going to go over there and kick his ass. I think those were the actual intentions, but since Kenny was being a punk, I think it just made Michael more angry." "Was Michael mad?" "Infuriated." And then you go down to about the middle of the page.

THE COURT: I guess I'm confused whether the first or second statement. And now we're in a whole different issue that has not yet been raised to the Court, and that is now sanitizing the statements. And, frankly, I don't want to spend a great deal of time other than to give you the opportunity to say what your concerns are at this juncture. That may have to be done outside the presence of a jury at a more manageable time. Are you talking about page six of eight of the second statement?

MR. McGAVICK: Right. Which is the one at the top. It says Detective Sergeant Jim Costa first.

THE COURT: I have that.

MR. McGAVICK: The first answer, the first [59] and second answers on that page.

THE COURT: On page six of eight?

MR. McGAVICK: Down at the bottom, it says page six of eight. The first question begins "Okay, I need, I need –"

THE COURT: Right, I see that. Okay. Now I've caught up to where – so I think that as far as that, he was going to go over there. So I don't know what you're asking.

MR. McGAVICK: Well, in the last paragraph of *Burden* says that the marital privilege doesn't exclude these statements. The testimony, however, must still meet other requirements for admissibility. There's no hearsay exception to satisfy these statements as to her speculation as to his state of mind. And a statement she gave to someone else, that is uncross-examinable here.

THE COURT: Well, maybe the answer is that the State calls the witness to the stand and by individual direct question ask the witness what was asked and what the wife responded. That's what we get into when we start admitting these statements carte blanche. It's a pick-and-choose problem. I want to get started with the jury. A lot of these could have been subject to pretrial motions in limine in advance [60] of the day of trial. I told the jury to be here at 8:45 because I thought we could start fairly close to that time. Now I've got them waiting again. I want to proceed. If we need to hash this out for another half an hour, tell me what we need to do or else I'm going to proceed and go ahead, I'm going to tell the jury to go home for the morning or the day. If it's the intent of counsel – it's the request of counsel to go point by point throught [sic] the statements now that I've made the ruling, we need to do that at another time before there's any reference to the statement or their admission.

MR. McGAVICK: Your Honor, I appreciate the inconvenience and delay which the Court is frustrated with. I'm frustrated as well. There's a lot at stake here for everybody and especially Mr. Crawford. I think if the State

would stay away from these issues and perhaps we could come in early tomorrow morning and revisit them, perhaps we could discuss this afternoon how we could take up parts of Sylvia's statements where she tries to establish her husband's intent. There's a lot at stake. I'm willing to go forward with the jury, but I think until this is –

THE COURT: Well, I have had no motion before me or no particular points raised to me by defense as [61] to, on the assumption the Court would rule the statements admissible, what portions of the statement are nevertheless under the rules of evidence inadmissible. The way I'll tackle this, I will rule even though statements one and two are admissible under the *Burden* and *Lilly* criteria, that they don't come in in their transcript form, that the statement taker is going to have to testify as to what he was told by Ms. Crawford, and then, that way, counsel can direct the attention of the detective to what statement made by Sylvia Crawford he wants admitted by the testimony of the detective who took the statement.

MR. McGAVICK: So I understand that to be the end of this discussion.

THE COURT: Well, that's what I'm ruling right now. And then if you want to take up before that happens further request to tell me in particular what you want stricken from the statement, either one or both of the statements, then I guess we'll have to have a further hearing outside the presence of the jury. I'm not going to preclude you from doing anything. I just want to know what you want to do so I can manage the jury.

MR. McGAVICK: I appreciate that, Your Honor. I will attempt to be more specific, and I will [62] have something for this Court's consideration either by the end

of business today or early before the regular court convening time tomorrow.

THE COURT: Okay. Mr. Lund, can you make any response?

MR. LUND: Not to that issue now because of the time.

* * *

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

STATE OF WASHINGTON, Plaintiff, vs. MICHAEL D. CRAWFORD, Defendant.	)	No. 99-1-1205-8 VOLUME III

VERBATIM REPORT OF PROCEEDINGS

(Filed Apr. 10, 2000)

BE IT REMEMBERED that on October 20, 1999, the above-entitled and numbered cause came on for hearing before the HONORABLE RICHARD A. STROPHY, Judge of Thurston County Superior Court.

APPEARANCES OF COUNSEL:

For the Plaintiff State of Washington	ROBERT LUND Prosecuting Attorney's Office 2000 Lakeridge Dr., SW, Bldg 2 Olympia, WA 98502
For the Defendant	HUGH J. McGAVICK 2415 Pacific Avenue, Suite A Olympia, WA 98502

REPORTED BY: Aurora J. Shackell, Official Court Reporter C.S.R. No. SHACKAJ334KD

[139] THE COURT: The clerk has given me three versions of the second statement of Sylvia Crawford: Apparently an original without any changes; apparently one that has changes lined through it; and then one that has been redacted.

MR. McGAVICK: Right. Your Honor, I think if I may be heard, I think we can simplify this. Mr. Lund and I have agreed to redact pages four and six on a few of the – if you look at the – if you look at the lines copy on page four, you'll see in red is – or underlined, we've agreed those statements should not go to the jury.

THE COURT: All right.

MR. McGAVICK: And I'm prepared to redact – and then also on page six, there's another two or three lines which we agreed should be redacted.

THE COURT: Now, there's one there that you have yellowed out.

MR. McGAVICK: Right.

THE COURT: There are two areas of page four that are yellowed on your lined copy, and those don't appear – those not underlined yellowed portions do not appear to be redacted; is that correct?

MR. McGAVICK: That's correct, Your Honor. And the reason for that is, I proposed that those [140] things which are yellow highlighted on your copy but not underlined, I proposed to Mr. Lund that those be stricken. He disagreed. I think the Court's already addressed this. I will just say I would urge the Court to strike those based on my client's confrontation clause, right to confront his accuser about statements regarding what his state of mind and what his intent was.

THE COURT: All right. Well, those yellowed portions of page four of eight that were not underlined and therefore not redacted, I believe, are admissible. The one in the middle of the page is, I think, a fair reference to what Mike had apparently said. "Mike, he's like, that – yeah, that dude deserves an ass-whooping, you know." That attributes that – more a statement to him than a conclusion that she made. On the lower portion, she has indicated her assessment of his temperament at the time and his sobriety, which is an appropriate allowable – I should say, subject of lay opinion.

Now, the next pages, apparently six of eight, my inclination is to allow that yellowed portion, as well. Again, there's enough of a basis for it in that she qualifies that she had seen him mad, been with him for years. She's seen all sides of him. She later in [141] further questions and answers qualifies her answer and asks the questioner to qualify the question as to what is out of control, such that I believe I would allow those questions and answers.

MR. McGAVICK: I appreciate and respect your rulings. If I could just make one point . . .

THE COURT: Go ahead.

MR. McGAVICK: On page four, the part where "Mike, he's like, yeah, that dude deserves an ass-whooping," from my reading of that, it's unclear whether that's her impression or a quotation of a statement. Doesn't say Mike said, yeah, that dude deserves an ass-whooping, so I believe it's ambiguous and should be kept out as speculation on Mrs. Crawford's part.

THE COURT: And I understand your point. Could perhaps be that way, but I think more likely than

not, in the context of her further answer she gave prior to that phrase, she said, "It led up to it. We were talking about something, or someone mentioned Kenny, and Mike, like he's" – when I hear young people talk, they don't say "he said" or "she said". They say "he goes," "he's like," da da da. So that's my thinking in allowing that.

MR. McGAVICK: Very good. And I would [142] request a continuing objection to all of these as noted in the motions in limine.

THE COURT: Your objection is noted, and –

MR. McGAVICK: Thank you.

THE COURT: You have given extensive argument before, and this gives me an opportunity, frankly, to make more complete the record on my rationale for allowing it under the *Lilly vs. Virginia* and *State vs. Burden* and *State vs. Ryan* cases. In these cases, reliability and trustworthiness is the focus of the Court. As the *Lilly* court opined, that the central concern of the confrontation clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact when the government seeks to offer declarant out-of-court statements against the accused. And, as in this case where the declarant is unavailable, courts must decide whether the clause permits the government to deny the accused his usual right to force the declarant to submit to cross-examination, the greatest legal engine ever invented for the discovery of truth.

The court further opined in ruling on the statement, that issue in the *Lilly v. Virginia* matter, in the trial court, the U.S. Supreme Court said, "We [143] assume, as we

must, Mark's brother's out-of-court declarant statements were against his penal interest as a matter of state law. But the question whether the statements fall within a firmly-rooted hearsay exception for confrontation clause purposes is a question of federal law." Accordingly, it is appropriate to begin – or to make their analysis by examining the firmly-rooted doctrine and the roots of the against penal interest exception.

The court in *Lilly* analyzed statements against penal interest which are offered into evidence in three principle situations: The first is a voluntary admissions against the declarant; the second as exculpatory evidence offered by a defendant who claims that the declarant committed or was involved in the offense; and, thirdly, the evidence offered by the prosecution to establish the guilt of an alleged accomplice of the declarant. And the Court discussed the first category of statements, those that were made as voluntary admissions against the declarant in the context of *Bruton* analysis and *Gray vs. Maryland, Richardson vs. Marsh* talked about redacting and the Bruton issue.

The second category, statement by a declarant against penal interest, which were offered as [144] exculpatory evidence by a defendant who claims that it was the maker of the statement, rather than he, who committed or was involved in the crime in question.

We don't have that second category involved here, because the defense is not attempting to admit the statement of Sylvia Crawford in attempt to exculpate himself or exonerate himself. The Court then turned its attention to the third category of cases in which the government seeks to introduce a confession by an accomplice which incriminate a criminal defendant, statements that, when offered

in the absence of the declarant, function similarly to those used in the ancient ex parte affidavit system, in the Supreme Court's view, and, therefore, was deemed inherently unreliable.

However, as the Court continued in its analysis, to look at those types of alleged accomplice statements which incriminate the accomplice together with the defendant ought to be received with suspicion, and the very greatest care and caution ought to be passed upon by the jury under the same rules governing other and apparently credible witnesses. The admission of a non-testifying accomplice's confession which shifted responsibility and implicated the defendant as the trigger man plainly denied the defendant a right of [145] confrontation in *Douglas vs. Alabama*. However, the Court went on to discuss what was unambiguous versus an ambiguous statement adverse – ambiguously adverse to the penal interest of the declarant, and statements that are likely to be an attempt to minimize the declarant culpability. And the Court finally concluded that in a case of an accomplice or potential accomplice confession or statement against penal interest, that was not – that did not fall within a firmly-rooted exception of the hearsay rule.

And then the Court turned its attention to whether or not the inherent unreliability presumed or applied to such statements could be overcome and to be admissible under the confrontation clause hearsay evidence used to convict the defendant must possess an indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at the trial. Then they analyze the statement before them from that – that was before the Virginia court, statement of a brother who was in custody, who was

primarily responding to leading questions who had a natural motive to exculpate himself as much as possible.

Here, I concluded earlier that Sylvia didn't have a natural motive to exculpate herself, as much as [146] possible, since she – her statement regarding who was the stabber was consistent with the defendant's, and the thrust of her statement was to convince the police that the conduct of her husband was either in self-defense or in justified reprisal for an indignity she suffered at an earlier time.

But in analyzing further indicia of reliability pursuant to *Ryan* factors, the *Ryan* case admittedly was applying its reliability test to the statements of children who were under the age of ten years old, I believe four and a half and five years old. There, the trial court concluded the children unavailable by virtue of the fact simply they were under ten years old. The Supreme Court wasn't willing to make that broad a conclusion and ruled that just because a child was under ten years old did not render the child incompetent and, therefore, unavailable.

But then the Court went on and discussed indicia of reliability. While there may be some potential for a motive of a wife to lie she declared in her statement her motive was to assist her husband and, therefore, make a further statement. Her general character, not much is known about it. It is perhaps checkered, with respect to reliability.

MR. LUND: Your Honor, could I just [147] interject? We've run a criminal history of Sylvia Crawford. She has no criminal history.

THE COURT: Her statements were given to law enforcement, and, obviously, she is an adult. These statements were not made spontaneously. The timing of the declaration being contacted shortly after the alleged incident, and the relationship between the declarant and the witness, obviously, was a person that was being questioned by law enforcement, and, thus, the witness is a law enforcement agent, neutral to her and not someone who would be inclined to advance her interests and shade her version of the truth unfavorably toward the defendant. She didn't suffer from any lack of knowledge. She was an eyewitness. She did make express assertions about past facts, and the statement was made very close in time to the event, and, thus, the possibility of her faulty recollection is remote, and the circumstances surrounding the statement, I do not believe they're such of significant reason to suppose she made misstatements or misrepresented defendant's involvement with respect to who the stabber was and his state of mind.

Accordingly, by consideration of those factors enumerated in *Ryan,* and also with reference to *State vs. Paris* and *Dutton vs. Evans,* explain and further [148] illuminate my rationale given earlier.

Anything further, then, we need to review with respect to those statements?

MR. LUND: No, Your Honor.

MR. McGAVICK: No, Your Honor.

* * *

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,
v.
MICHAEL D. CRAWFORD,
Respondent.

NO. 71683-8

ORDER DENYING MOTION FOR RECONSIDERATION

(Filed Dec. 12, 2002)

The Court having considered the Respondent's Motion for Reconsideration.

Now, therefore, it is hereby

ORDERED:

That the Respondent's Motion for Reconsideration is denied.

DATED at Olympia, Washington this 12th day of December 2002.

For the Court

/s/ Gerry L. Alexander
CHIEF JUSTICE

147 Wn.2d 424

TRIAL EXHIBIT NO. 38

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

[Caption Omitted In Printing]

Case Number 99-6530
Detective Russ Geis Statement of Sylvia Crawford

The case number is unknown at this point (99-6530). The time is approximately 7:03 p.m. The date is August 5, 1999. I'm Detective Gies of the Olympia Police Department. Also present is Sylvia

Q and what's your last name

A Crawford

Q Crawford. This statement's being recorded at the Olympia Police Department in a conference room. Sylvia, do you understand this statement is being recorded and is this with your consent

A yes

Q ok, please speak up

A yes

Q would you give me your full name and spell it please

A Sylvia Margarita Crawford SYLVIA-MARGARITA-CRAWFORD

Q would you give me your address please

A 8100 Dawn. DAWN Hill Drive, Olympia, Washington 98513

Q would you give me your home phone number

A 455-8738

Q do you have a work phone number

A no

Q would you give me your date of birth

A 3/10/78

Q Sylvia, this'll be your warning and waiver of constitutional rights. You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right at this time to an attorney of your own choosing and have him or her present before and during questioning and the making of any statements. If you can not afford an attorney, you are entitled to have one appointed for you by the court without cost to you and to have him or her present before and during questioning or the making of any statements. You have the right to exercise any of the above rights at any time before or during any questioning and the making of any statement.

A I have a question

Q sure

A since I don't have a lawyer and can't afford one, would we be let go until there was lawyer present or what. How does that work

Q well, if you don't, if you can not afford one, one would be appointed to represent you

A yeah but one's not here

Q one's not here now. If you want a lawyer here before you say anything, you have the perfect

A will I be detained or will I be let go. (Inaudible) How does that work

Q I don't know if you'll be let go or detained more at this point or not. It depends on how the investigation continues. Ok, so I, I can't answer if you'll be detained longer or not, I don't know. At this point this is under investigation and that's, that's where we're at, at this point. Do you understand that

A uh-huh (yes)

Q is that yes

A yes

Q ok, cause the tape can't see your head

A yeah

Q do you want me to read it to you again or do you understand it

A I understand it

Q ok, what I'd like you to do is I'd like you to sign here signifying you understand those rights. Ok, and don't hesitate, Sylvia, to ask any questions. (signing) This is the waiver to your rights

A I (inaudible)

Q ok, listen carefully. I have read or have had read to me the above explanation of my constitutional rights and I understand them. I have decided not to exercise these rights at this time. Any attached signed statements are made by me freely, voluntarily, and without threats or promises of any kind. Do you understand that

A uh-huh (yes)

Q is that yes

A yes

Q ok, do you wish to waive your rights at this time. In other words, do you wish to talk to me now

A and get it over with or talk to you later and get it over with, with more advice on what's going on?

Q it's your decision. It's totally your decision. You can stop talking at any time. Like if I ask you a question and you don't wish to answer that question, you don't have to

A ok

Q do you understand that

A I don't have to answer any questions

Q you don't have to at this point if you don't want to

A ok

Q or you can just answer a few questions or you can answer them all, it's your decision

A I'll go for that

Q ok, does that mean that you'll waive your rights at this time. Ok, that's a yes

A yes

Q ok, don't hesitate to ask anything, ok

A ok and earlier while I sitting here, I heard officers talking outside and I heard one of them say they didn't believe me and that (inaudible) charges before here and yada, yada, yada and whatnot

Q ok, I don't know anything about that

A why would, why would they say that

Q I don't know why

A (inaudible)

Q I can't speak for them. All I can say is maybe they don't believe you. I don't know

A the officer when he came in and he said that it wasn't said but I know that I heard it. I'm [sic] know I'm not crazy

Q well, I don't know why they said it. I just called in from home, ok, so I don't know why they said it. I'm here, as I've told you earlier, to get to the truth

A yeah

Q that's why I'm here, ok. I can't say I don't believe you or believe you because I haven't had a chance

A (inaudible)

Q I don't know what's going on, ok, do you understand. Ok, I'd like you to sign here signifying you understand the waiver and you wish to waive your rights, ok

A alright

Q ok

A (signing) (speaking under breathe [sic])

Q ok, let's back up to this afternoon or maybe early this afternoon and who is Michael Crawford

A my husband

Q ok, and you and Michael apparently were at somebody's residence today, is that correct

A yes

Q ok, let's start at perhaps noon today. Were you with that individual from noon on today

A Nope

Q ok, were you with Michael

A yes

Q ok, how did you, and the individual that the other individual apparently involved, apparently (inaudible) name, Kenny

A uh-huh (yes)

Q (inaudible) say yes or no

A yes

Q ok, do you know his last name

A unh-unh (no) I don't

Q no, ok, when did you, how long have you known Kenny

A I think it's three or four years now

Q has Michael, your husband, known him for three or four years

A he's known him longer

Q longer, ok, and have you and Michael been to his residence before

A not together

Q ok, be sure you speak up. So you've been there alone with Kenny

A no

Q has Michael been there alone with Kenny

A not to my knowledge

Q ok, would you say that maybe Michael and Kenny are good friends

A (inaudible) yeah, they respect each other

Q ok, maybe drinking buddies, just friends

A (inaudible) moved away and I just got back into town not too long ago so

Q how long

A I've been back into town two months now ok

Q why did you move away. Were you separated from Michael for awhile

A um, yeah

Q ok, did you and Michael go over to Kenny's residence today

A yep (yes)

Q do you know where Kenny lives

A yes

Q do you know his address

A no

Q do you know the street

A no

Q ok, is it an apartment or a regular house

A apartment

Q ok, and what time did you and Michael go to Kenny's residence

A I don't know the time. It, it was, af. . ., it was late afternoon, (inaudible) early evening

Q ok, and why did you and Michael go to Kenny's residence

A to go drinking

Q ok, with Kenny

A with Kenny

Q had he invited you guys over

A yes

Q ok, be sure you speak up

A yes

Q ok, so you and Michael showed up

A yeah, we were all there

Q ok, who else was there

A Kenny

Q is that all

A yes

Q did you take beer with you or was beer already there

A he had said beer was already there we didn't take any with us

Q when did he invite you over

A like I said, early afternoon. We got downtown, walking around, doing our usual thing (inaudible)

Q oh, and then he invited over to come on over and go drinking

A yeah, well, (inaudible)

Q ok, be sure you speak up. So you guys arrived and started drinking

A no

Q what happened

A we arrived, looked for alcohol and there wasn't any so he sent Michael to go get some. (Inaudible) immediately he pinned me down

Q ok, we'll get to that, we'll get to that. So he sent Michael to go get beer

A uh-huh (yes)

Q did, is that yes

A yes

Q did he give Michael money to go get the beer or did Michael take his own money or what

A I don't (inaudible) as far as I knew, Kenny said it was his treat but I'm not positive

Q you already drunk

A I (inaudible) been drinking

Q during the day

A yes

Q and you felt you were pretty intoxicated at the time

A yeah, we were all just having a good time. We were all smiling and laughing and joking around

Q downtown

A um, yeah, (inaudible) met up with each other and we walked down to his place

Q ok, how long were there before Michael went to go get beer

A (inaudible) minutes (inaudible)

Q oh, not long at all

A no

Q ok, Michael left

A Michael walked out the door

Q and

A Kenny got up to lock it

Q Kenny got up to lock the front door. Is that yes

A yes

Q ok, did Kenny lock the front door

A I think so

Q what happened then. Did you feel anything strange at that point, when he was locking the door

A yeah, I asked him why he did that

Q and what did he say

A he said *oh, just because*

Q ok, be sure you speak up Sylvia

A he said *Oh, just because*

Q ok, what happened then

A what happened then he started asking me if I was drunk

Q and what did you say

A I was like, yeah, I'm a wee bit tipsy, you know, and, and, and he took he kind of like touched my leg, a little bit

Q your leg

A my leg

Q were you standing up

A no, sitting down on the floor

Q you were sitting on the floor

A yeah, (inaudible)

Q (speaking over) with your knees together like an Indian would sit

A yeah, yes, you know like

Q or kind of like a yoga would sit

A (inaudible) in kindergarten, you know, sitting Indian style (inaudible)

Q (inaudible) kind of like an Indian or yoga style

A yes

Q so you're sitting like that, did he get down and he got down and touched your leg

A he's sitting down (inaudible) at an angle (inaudible)

Q be sure to speak up and talk slowly, walk me through

A ok, and so then he touches my leg at first and I was like (inaudible)

Q right below the knee, you show me

A ok, yeah

Q ok

A below the knee and I asked him *what are you doing* and he was like *well, why did you come up here* and I was like *what'd you mean, to have a drink* and he was like *I know you came up here for one* and then the bed is right there, it's a studio apartment, and he pinned me on his bed

Q how did he pin you on the bed, did he lift you up

A (inaudible) no, he got up and he went over me and pinned me on the bed and I told him, (inaudible) I said *Kenny get off, Kenny get off* and he wasn't listening and he didn't get off and I just started screaming louder and I

don't think Michael headed to the store, I think he heard me screaming cause there was he didn't come back with beer and then Mike was pounding on the door and it was like *let me in* and I was like *Kenny get off* and Kenny got up. (Inaudible) and he started kicking the door, I think, it was loud, (inaudible) and I don't know what happened after that (inaudible) and then we ran

Q well, let's walk. How did you end up on the bed, is the bed on the ground, is the mattress

A yes, it's on the ground, it's not up or anything

Q it's a mattress basically

A yeah

Q ok, did he attempt to take off any of your clothes

A he was going like this and pulling (inaudible)

Q ok, so you got on grey

A sweat pants

Q kind of warm up pants, basketball style warm up pants, is that correct

A I guess

Q ok, and your waist is a stretch band around the waist

A (inaudible) stretch (inaudible)

Q ok, and what did he try to do with your pants, did he try to pull them out and then downward, or pull them down or what

A no, he had me and he was, I don't know, (inaudible) he did it his hands (inaudible)

Q waistband

A and he was pulling down, (inaudible) with my foot

Q ok, so he tried to pull your pants down and you were able to fight him off

A ok, I'm getting uncomfortable

Q is that correct

A yeah, it wasn't, yeah, I guess

Q ok, but he was not successful because you were able to fight him off

A no he wasn't successful, it wasn't really a fight. It was like a push more, it was

Q you were resisting

A yes

Q ok, and then you started screaming and then you hear

A I started screaming once he pinned me down, I said *get the fuck off me*

Q ok, and then a short time there after within maybe a few seconds, you heard Michael

A it was a couple minutes, he had to walk down the stairs and stuff. I don't know (inaudible) happened

Q ok, but within a couple of minutes, Michael was back banging on the door

A yes

Q ok, and Kenny got up and opened the door

A yeah

Q did you see what happened when Kenny opened the door

A I didn't, (inaudible) there's a wall there, I got up but I didn't, there's a wall there and then when I came around the corner, I realized that Kenny was bleeding and got blood on my pants and we ran. I was like Mike, (inaudible) *let's get outta here* and he was *well*, like you know, we were discussing what we should do . . . I don't know

Q was Kenny down on the ground at this point

A Kenny, (inaudible) when I came around the corner

Q right

A no, he was still (inaudible) just falling

Q just falling

A I think that's how some blood got on me

Q did you see

A I don't know

Q did you see if he had anything in his hand

A unh-unh (no)

Q did you see if Michael had a knife

A unh-unh (no) I was flipped out man, I just wanted to leave

Q ok, did Michael say anything about what had happened, think back

A he asked me if I was ok, he asked me if Kenny had hurt me, he asked me if, I was, yeah, he just asked me *are you okay, are you okay,* and I'm like, *yeah, are you okay,* you know, I said *what happened to your hand* he was like *I don't know* (inaudible)

Q ok, so he didn't tell you if he'd stabbed or if he had to self-defense or anything like that with Kenny

A unh-unh (no)

Q is that no

A no

Q ok, did Kenny say anything that you know of, is that no, like a uaaaaa (pain sound)

A grunted

Q that was it okay so you guys quickly left the scene

A yes, right away

Q did you ever see Michael carrying a knife or anything

A no, I asked him for a cigarette and he gave me one so his hands were free

Q did you see blood on his hands

A yeah, I asked him what happened to his hand

Q and what did he say

A he said *I don't know* (inaudible)

Q his hand was cut

A his hand was cut, pretty, he didn't let me see, it even (inaudible) cause I saw blood dripping from my sweater cause he had it covered up

Q ok, do you remember anything else Sylvia

A yeah, Mike gave me the cigarettes

Q ok, do you feel

A (inaudible) lighter

Q do you feel that when Kenny pushed you down and attempted to take off your pants do you feel like he was trying to sexually assault you

A yes

Q ok, did you at all, do you feel you, at all, that you gave him any indication that you would like to have any sexual activity with him

A no

Q ok, did he, while you had contact with him during the day from downtown to the apartment, did he at all advise you, before hand that he would like to have any sexual activity with you

A no, Mikey was right there, he would never say anything like that in from [sic] of Mikey

Q ok

A he was looped

Q he was looped

A (inaudible)

Q do you feel he was highly intoxicated at the time

A that I couldn't tell I (inaudible) intoxicated I couldn't

Q you weren't but you don't know if he was

A unh-unh (no) I was out having a good time, smiling, laughing and joking around, I and I wasn't, you know, (inaudible) you want anything, and (inaudible)

Q ok

A it's none of my business

Q ok, how come you didn't call police when you saw Kenny was hurt

A are you kiddin', to be honest I

Q I want you to be honest

A I'm not really too upset about the fact that Kenny got hurt

Q because of what he was doing to you

A yes, because of what he was doing to me

Q ok

A the fact that he didn't respect me, the fact that he wouldn't get off, yeah

Q ok

A what was I suppose to do, call the cops and say he was the one who tried to rape me

Q do you have anything else you can remember Sylvia, anything else at this point, ok, be turning off the tape at this time.

Transcribed
REG:kc

TRIAL EXHIBIT NO. 40

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

[Caption Omitted In Printing]

Case Number 99-6530
Detective Russ Gies/Detective Sergeant Jim Costa – 1st Statement of Michael D. Crawford

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The case number is unknown at this point. The time is approximately 8:00 p.m. The date is August the 5th, 1999. I am Detective Gies of the Olympia Police Department. Also present is Detective Sergeant Jim Costa of the Olympia Police Department, and Mr. Michael Crawford. This statement is being recorded at the Olympia Police Department in a conference room.

Q Michael do you understand this statement is being recorded and is this with your consent

A yes

Q would you give me your full name and spell it please

A Michael Crawford or Michael David Crawford – MICHAEL - DAVID - CRAWFORD

Q would you give me your address please

A 1919 Evergreen Park Drive, Apartment 108 and that's in Olympia

Q would you give me your home phone number

A 352-2476

Q would you give me your work phone number

A I'm not currently working

Q would you give me your date of birth

A 11/22/77

Q this is the warning and waiver of constitutional rights. You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right at this time to an attorney of your own choosing and to have him or her present before and during questioning and the making of any statements. If you cannot afford an attorney you are entitled to have one appointed for you by a court without cost to you and to have him or her present before and during questioning or the making of any statement. You have the right to exercise any of the above rights at anytime before or during questioning and the making of any statement. Michael, do you understand those rights

A yes

Q speak up a little bit

A yes

Q Michael, I'd like you to sign right there signifying that you understand your rights

A I admit I understand that I'm waivin' my rights (document being signed)

Q you've just signed the signature for the understanding of the constitutional rights and you're also, went down a little bit and signed the signature for the waiver to your rights, is that right

A yes

Q what I'm gonna do though Michael is, I'm gonna read them to you, okay? I know you, you want to waive

them, at least that's the indication you're giving but I want to read them to you, okay? Do you understand that

A yes

Q I have, this is the waiver: I have read or have had read to me the above explanation of my constitutional rights and I understand them. I have decided not to exercise these rights at this time. Any attached signed statements are made by me freely, voluntarily and without threats or promises of any kind. Michael, do you understand the waiver

A yes

Q do you wish to waive your rights at this time

A now, does that mean that . . . that if I choose to take that right again, I still can or

Q what, if you waive your right, it means I'm going to ask you questions. You're giving me the okay to ask you questions and you can stop talking at anytime

A okay

Q even if you give me the right to ask you questions and you don't wanna answer any of those questions you don't have to. If you just wanna answer one out of maybe 20 you can do that or you can answer all 20. It's your decision

A okay

Q do you understand that

A yes

Q okay, does that, now you've signed your name already. I'm asking you now, do you wish to waive your rights

A yes

Q okay. For goodness sakes, you have any questions you ask Detective Sergeant Costa or I, do you understand that

A yes

Q okay. Detective, I'd like you to sign there as a witness (document being signed). Michael, you're married to Sylvia

A yes

Q and that's Sylvia Crawford

A yes

Q okay, do you and Sylvia currently live together

A yes

Q okay, the reason I ask is I believe she gave me another address

A she was living at um, this guy Paul Blum's house for awhile. She just, she very recently moved back in with me

Q okay, but you are married

A yes

Q okay, and do you know a Mr. Kenneth Lee, I guess he goes by Kenny

A yes

Q how do you know Mr. Lee

A oh, we've known each other for years from downtown originally

Q drinking buddies

A that and then other things

Q give me an example of other things

A I don't wanna specify on that

Q okay, and does your wife Sylvia know Kenny

A yes

Q how long has Sylvia known Kenny

A um, about half as long as me, about 3 years

Q okay, so you've known him maybe 6 years

A yeah

Q give or take? Is that yes

A yes

Q okay, be sure you speak up. Did you and Sylvia walk downtown today and perhaps run into Mr. Lee or how did you run into Mr. Lee today

A we ran into him downtown

Q what time

A I don't, I don't even know what time it is now. I have no idea what time it is

Q it's a little bit after 8:00 o'clock now, at night

A must a been a few hours ago

Q would this of been the afternoon that you ran into Kenny

A yeah, it was afternoon

Q was it pre-planned that you run into him or was it by chance

A it was by chance

Q and so you guys ran into Kenny Lee downtown Olympia area

A yes

Q and what happened when you ran into Kenny Lee

A um . . . . well, I asked him about some money he owed us um, he told me to come by his place

Q okay, and he apparently owed you some money for perhaps some marijuana or drugs

A I (won't?) (inaudible) specify

Q okay, but he owed you money for something that you had given him in the past

A we had loaned him some money so that he could

Q okay, but, and he owed you money

A yes

Q and you asked him if he had the money, what was his answer

A he just said he'd probably ~~have~~ somethin' for me and told me to come by

Q his residence

A yes

Q had you ever been to his residence before

A I hadn't

Q do you know if Sylvia had ever been there

A um, she had told me about something that happened at one point but I wasn't sure

Q okay, can you be specific as to maybe something that happened

A she had told me that he tried something with her before. Someone else had to help fight him off her and she got away and I wasn't sure if I believed it cuz, I don't know, she's bullshitted me a few times

Q when you say something happened, does that mean perhaps he had attempted something of sexual activity on her

A yes, forcefully

Q okay, if it's true, why . . . did you agree to go to his place then after he said he might have something for you

A yes

Q was Sylvia with you at the time

A yes

Q did Sylvia go along with you

A yes

Q did you feel uncomfortable going there when Sylvia had said previously

A somewhat

Q but you went anyhow

A yeah, I figured I could handle it

Q were you under the expectation that he might pay you some money

A yes

Q did the three of you then walk to his residence

A yes

Q do you know where his residence is

A it's the brown apartments

Q do you know the address

A no

Q do you know the street they're on

A um, the one that goes up by Priest Point Park by AM/PM

Q by AM/PM

A yeah

Q off of that street that goes towards Priest Point Park

A yes

Q okay, so the three of you went to his apartment

A yes

Q speak up

A yes

Q okay, and did the three of you then go in the apartment

A yes

Q did you go for any other reason to the apartment then just to collect money from him? Was it possibly to visit, to . . . do drugs, to drink beer, any other reason but to collect money

A I wouldn't specify on that

Q okay. So, three of you went in the apartment

A yes

Q what happened then

A well, we agreed that I was gonna go to the store . . . and

Q why did you agree to go to the store

A (inaudible)

Q was there something missing that you needed

A yes

Q what was that

A I don't wanna specify

Q okay. Could it have been beer

A it could have been

Q okay. So you left the residence to go get something that could of been beer

A yes

Q who, did you have the money or did he give you the money

A I had some money and he gave me five bucks

Q okay, and how long were you in the apartment before you agreed to go get the item

A I'm not sure

Q guestimate

A guestimate. I would say under an hour but close to an hour

Q okay, and let, let's approximate then 45, 50 minutes. What happened that time that you were in the apartment during that period of time

A oh, we just bullshitted and stuff, and he told he'd get paid when he got his money or that he'd pay me some, somethin' and it was all cool, and he asked Sylvia if she was mad at him. So I knew something had to of happened

Q okay, so he asked Sylvia if she was mad at him and what did Sylvia say

A she said it was okay, so ya know

Q did that make you a little suspicious that maybe he had attempted something

A yes

Q so what you're telling me is you sat there for 45 and 50 minutes and just visited

A yeah

Q is that correct

A yes

Q okay, and then you decided you needed something so you took some of his, he gave you some money, you had some money and you left to go to the store

A yeah, well, he, he, he bought [sic] it up sayin' that he wanted some more ya know, and so I was like, okay

Q perhaps some more beer maybe

A perhaps

Q okay, continue

A and, and he, I asked him ya know, if he wanted to go to the store with me and he said he didn't wanna go anywhere so

Q speak up

A I started to go and then I felt comfortable leave, uncomfortable leaving Sylvia there and went back to go get her and I heard (audible) and they were fightin' by the door

Q okay, so you left the residence and closed the door behind you

A yeah

Q and would you describe where you went from there? Do you have to go down steps or up steps

A down steps

Q how many steps

A I don't know

Q a lot

A enough

Q 20

A maybe

Q okay, and where did you go when you decided you didn't feel comfortable and you turned around to go get her? Where were you at when you turned around

A um, I was close to AM/PM

Q okay, and this residence is very close to AM/PM anyhow, isn't it? Would you say you were half way to the AM/PM, a third of the way, two-thirds of the way

A I'm not sure

Q okay, but you never made it to the AM/PM

A no

Q okay. You decided to turn around and go back

A yeah, I started walkin' there and then I started walkin' back from the AM/PM and I was thinkin' 'Well, well, I don't know'

Q speak up

A and then I decided to go back and get her

Q kay, so you turned around, walked back

A yes

Q what happened then

A well, I went and, I heard something inside the door and I opened the door and they were fightin' on the floor

Q kay, you're at the door and what did you hear

A I heard her screaming

Q what was she screaming

A I don't remember

Q was it a distressful scream

A yes

Q and you opened the door or did he open the door? Or how did you, how did the door open

A I honestly couldn't, honestly answer that. I, I don't know if I opened it or if he opened it or if she opened it. I don't know

Q did you make any effort to knock on the door or yell in the door prior to the door opening

A I believe I said something

Q think back

A (pausing) I said something to Sylvia, I don't know, something like, 'What's going on? Or what's' something, I don't know

Q this is while you were outside the door

A yeah

Q kay, so some way or another the door opened but you don't recall how

A I'm not positive

Q when the door opened what did you see

A Kenny tryin' to hold her down . . . she was on the ground and he was like, on his hands and knees or on his feet squatin' [sic] down or somethin', just down lower than me

Q well, so, so I guess that would indicate if Kenny was down with her that would indicate apparently you're the one that opened the door

A possibly

Q okay. Let's describe the position that they were in again. Is there a wall that separates a room from the front door or could there be a wall separating any, any (inaudible)

A (pausing) I don't understand the question

Q walking through, the door's open and tell me what you saw again . . . . walking through . . . I think what I'll do . . . how about drawing me a picture. As best you can put the front door and . . . . and label everything because we'll need to know what everything is

A (pausing to draw picture) (inaudible) here's the door right here

Q okay, if that's not anything just cross that out then

A it's like a, it's like a hallway that goes in here

Q okay, and what's this

A I was thinking' the couch, but I'm not sure if it goes that way

Q okay, so this is a little wall here

A yeah, there's a wall that goes this way

Q okay, what's to the left as you walk in? Nothing? Just a front room

A this is the front room but I don't remember exactly where the couch was . . . . and they were like, right here

Q so where you've got them is right inside the front door

A yeah, it ended up out here somehow

Q outside the front door

A yes

Q okay, but let's, let's walk through what you're drawing. You opened the door and the door comes outward

A I don't remember

Q but there is nothing between you and them as they come in the door, is that correct

A (pausing) as they come in the door?

Q right. As, as, as he, as you come in the door you saw them plainly right inside the front door

A I don't even think I made it in the door. . . . I think that the fight came out the door

Q okay, but you said you looked in, you, and what did see, him and her on the ground

A yeah, right in the door

Q right in the door area

A like she was tryin' to get out the door or somethin'

Q and what position was she in

A she was on the ground tryin' to get up

Q was she on her knees or on, so she was, she looked like she was tryin' to get out the door

A yeah

Q and was she on her knees

A I, I don't remember

Q where was he

A he was like . . . . she was like, kinda like, right here . . . and he was like right here or it could a been reverse. He could a been right here and she was right here

Q okay, okay, but it was your thought she was attempting to get out the door

A that was my thought

Q what was he attempting to do

A he was trying to restrain her. He was yelling something, I don't remember what . . . fuckin' tryin' to stop her from gettin' out the door

Q okay, what happened then

A I don't know, I got aggressive at that point when I seen 'em and he got aggressive also

Q let's walk through what happened. Tell me what aggressive means

A I don't know, just, (inaudible) got in a fight with somebody, you start first yellin' at each other and then blows and . . . (inaudible) weapons, weapons start (inaudible)

Q well, did, when the door was there and you said they were right inside the door, you said it ended up a little bit outside. Did he get up and confront you? Did you confront him, what happened? Remember back, let's be specific

A (pausing) I kind of (inaudible) out when stuff like this happens, I mean . . . I could be tellin' you something, it might not be exactly how it happened

Q do you remember pulling your knife out of where it was

A I don't even remember pulling it out

Q do you carry a knife

A yes

Q where do you carry your knife

A on my belt

Q and is it on your right side of your belt or the left side of your belt

A usually the right side

Q and is it in a sheath

A yes

Q and is it, is the sheath something that you would maybe button over the top or is it the type of sheath that you can just reach and pull the knife right out

A you could, you could pull it out

Q okay, what kind of knife is it

A it's um, a filet knife

Q a filet knife. Give me approximate length

A mmm, 6, 7 inches

Q okay, do you recall pulling that out

A I recall putting it back

Q into the sheath

A yes

Q do you recall holding it or anything prior to that

A yes

Q what do you recall

A I recall getting my hand cut and I recall swinging the knife at him . . . and, and then Sylvia gettin' past. Once she was past me then we escaped down through the, the stairwell and just went from there and just were like, ya know (inaudible) 'What's goin' on?' (inaudible)

Q (inaudible) you recall swinging your knife, is that what you said . . . or pushing it or lunging it or what, what do you recall doing with your knife

A lunging, swingin'. We were backin' out the door. I don't . . .

Q was the knife in your right hand

A yes

Q so that would indicate evidently you pulled it out with your right hand

A I believe so, I'm not positive

Q okay, okay. Do you recall the knife striking him or any kind of a slash or a push into him or a swing at him that struck him

A yeah, I think I stabbed him

Q okay, do you recall how you stabbed him or what the motion was

A I believe it was a forward jab

Q okay, do you recall if it was one occasion, two or three

A I, I know I had to of got him once

Q how do you know that

A I felt, I felt, I don't know, I just felt (inaudible) ya know

Q you could feel the poke into him

A yeah

Q is that a good description, I don't know

A I don't know either, I

Q you know you got him once though

A I know (inaudible)

Q by a straight in stab

A yeah

Q okay, do you recall, think back, if you got him any other times

A I might of

Q you might of. Would those of been straight in stabs too, do you believe

A um, I, I'm not sure

Q kay, it's possible

A I was tryin' to but he was [illegible] and he had somethin'

Q kay, why were you trying to? Were you mad

A I was mad

Q kay, because you thought that he was doing something to your wife

A yes

Q and do you feel like your madness took over for a few minutes

A yes

Q do you know how your hand got injured

A I . . . I think he cut me with something. I may have tried to grab something in his hand(s). I'm not positive

Q do you recall him having anything in his hands

A I believe that he had something that he pulled from somewhere, one of his pockets or his belt or somethin'

Q you don't know what it was

A I recall him reaching for something. I remember my hand getting cut when I went to grab his arm

Q and when did he reach for something

A when we were in that confrontation of . . . when Sylvia was trying to get out the door, the door came open somehow and that's when he was reaching for something and that must a been when I reached for somethin'. I remember my hand gettin' cut

Q do you know, when you reached for your knife and you were swinging it and/or pushing it forward and striking him, do you know if he had tried to do anything to you yet or do you know if he attempted to perhaps come after you or was your hand cut after you had uh, swung your knife at him, do you recall

A I know, I know that it took impact outside of the apartment, which meant he was coming toward me. I remember him coming towards me and I know I didn't get him till he was outside of the apartment

Q okay, do you recall when your hand was injured? Was it during the altercation of you swinging the knife, could it, before or afterwards or do you remember

A I really think it was before

Q okay, you're not sure or you're sure

A at, at, at the beginning of the confrontation

Q okay, do you know how your hand got injured, with what instrument

A I don't know

Q did you ever see him with a knife

A I seen him pull something out of his, out of his belt. I don't know what it was

Q okay

A out of his pants or whatever

Q did he say anything to you

A I wouldn't remember if he did. He said something, I don't know what. I wasn't listening

Q what did you say to him

A I don't remember saying anything

Q was this a very fast confrontation? The door opened, before you knew it he was outside and before you knew it you guys were walking away

A it was very fast

Q okay, when did you realize your hand was cut

A well, I, I felt, I felt it ya know, at the beginning of the altercation but I didn't realize it was cut until I got down the road

Q you might wanna lift that up because it's bleeding pretty good (inaudible). Do you . . . (background activity) When did you put away the knife

A um . . . . outside . . . . when I felt comfortable. I, at first I just was holdin' onto it really tight and then when I,

I didn't see him comin' after us and that's when I put it away

Q why didn't you call police

A (pausing) I thought about it. We just walked down the street. I thought about catchin' a bus. I, I don't know, I've been in a lot of trouble and I just, I didn't know what to do. I mean, I, I thought about catchin' a bus then we decided not to catch the bus. We were thinking about calling the cops then the cops came to us

Q were you going to call the police or you don't know

A I may have

Q kay. When you were swinging the knife at him and lunging it into him, did you mean to hurt him? You were mad I take it

A (no audible response)

Q is that yes

A yes

Q okay

A I was mad

Q You were very mad

A yes. I realized that what she had told me earlier must of been true too

Q apparently about him trying something sexually on her

A (inaudible)

Q you meant to hurt him

A (pausing) I don't know if I meant to hurt him. I . . .

Q you were just

A probably part of me did

Q you were just in a, you might say a rage

A (pausing) you might say

Q okay. Detective Sergeant Costa

COSTA the injury that you have to your hand, did you do that to yourself

A I don't believe so

Q okay

GIES could you of? Perhaps as you were swinging and/or lunging at him could you have maybe, I don't know, been holding onto it maybe and actually sliced your own hand by accident

A I don't, I don't think I could a done that or, I mean, this is bad news. (Inaudible) he had, he pulled something out

Q okay. Why do you carry a knife

A protection

Q okay. Did Sylvia tell you anything after you guys left the scene as to what happened

A she was trying to but I wasn't really listenin'. I was just kind of in a panic mode

Q kay. When you left what position was he in? Where was he at

A he was at the like, on the stairway, at the top of the stairway

Q standing? Down? On his knees

A he was standing

Q he was. Was he crouched over

A he'd got into a defensive mode after I got him once

Q okay, do you know how many times you stabbed him

A no

Q do you have a guess

A once, maybe twice

Q okay

A (pausing) I asked her (inaudible) she said I, she thinks I got him three times

Q how did you try to stop your bleeding on your hand

A I was just holdin' it with my shirt

Q okay. Do you have anything you'd like to add

A no

Q have we coerced you into saying any of this or threatened you or anything

A no

Q kay . . . kay, Detective, what time is it now

COSTA 8:28

GIES time is now approximately 8:28 p.m. It's still August 5th, 1999, and we'll be turning off the tape at this time.

Transcribed:
REG/JDC:jp

TRIAL EXHIBIT NO. 42

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

[Caption Omitted In Printing]

Case Number 99-6530
Detective Sergeant Jim Costa – 2nd Statement of Sylvia Crawford

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This will be the statement of Sylvia Crawford. Today's date is the 5th of August, 1999. The time is 2243 hours. This statement is being recorded at the Olympia Police Department. Also present is Detective Holmes of the Olympia Police Department.

Q Sylvia, do you understand this statement is being recorded, and is this with your consent

A yes

Q would you give me your full name and spell your full name please

A Sylvia Margarita Crawford – S Y L V I A – M A R G A R I T A – C R A W F O R D

Q and your address

A 8100 Dawn Hill Drive, Olympia, Washington 98513

Q okay, you're gonna have to speak up just a little bit. Your date of birth

A 3/10/78

Q do you have a home telephone number there

A 455-8738

Q okay Sylvia, you've already talked to the police tonight, is that correct

A yes

Q okay, and uh, you understand at this point this statement is being recorded, correct

A yes

Q okay, before I ask you any questions and I explained this to you uh, earlier, but I'll go ahead and do it again. I'm gonna go through and read you your constitutional rights. You have the right to remain silent. Anything you say can be used against you in a court of law. Are you under the age of 18? No. Okay. You have the right to an attorney of your own choosing and to have him or her present before and during questioning or the making of any statements. If you cannot afford an attorney you are entitled to have one appointed for you by a court without cost to you and have him or her present before and during questioning or the making of any statements. Five: You have the right to exercise any of the above rights at anytime before or during questioning or making any statements. Now, do you understand each of those as I explained them to you

A yes

Q okay. The, and I told you earlier that uh, initially when the first Detective talked to you he didn't advise you of your rights, correct

A he advised me of my rights

Q did he

A he did

Q okay, so you understood them then too

A yes

Q okay

A and I, and I asked all the questions then

Q okay, you're gonna have to sit closer to this or we're not gonna hear you . . . Pardon

A just wrapping up my feet

Q okay um, on the bottom of this it says; I have read or have had read to me the above explanation of my constitutional rights and I understand them. I have decided not to exercise these rights at this time and it says, any statements, it says attached statements, but we're doing a, a taped statement, are made freely, voluntarily and without threats or promises of any kind. Is that true

A yes

Q okay, and I told you that you are not under arrest

A yes

Q and you understand that

A yes

Q and my reason for advising you of your constitutional rights was that uh, if you and I informed you that if you made a statement to me, an incriminating statement, that that statement could be used against you in a court, is that correct

A yes

Q okay. I was not present the first time you were interviewed by Detective Gies

A that's right

Q okay. I did sit in on an interview with your husband who is down here in our facility and I told you that, correct

A yes

Q and I came back in here what, about a half hour ago and I told you that there were some inconsistencies with the story that your husband had told us and with the first story that you told the Detective. Is that true

A yes

Q okay, and after we sat here for some time uh, you, I pointed out to you that I wanted the truth, is that correct

A yes

Q and you asked me to tell you completely what your husband had told us and then if I did that you would uh, let me know whether that was the truth or not, is that correct

A yes

Q okay, and I also told you that I wasn't gonna do that, correct

A correct

Q but I did tell you some of the things that your husband told us

A yeah

Q and after I told you that, you told me that you would tell me what really happened the night that you guys or what really happened tonight before you went over to this guy's house, correct

A yeah

Q okay. So I'm gonna start over again and go through that. This, what was the name of this person's house that you went over again

A Kenny

Q Kenny? Okay. You met Kenny in the past, correct

A yes

Q okay, tell me about happened, I told you that uh, your husband had told us that you had mentioned to him that something took place between you and Kenny in the past where he had done something sexual to you, correct

A yeah

Q and you didn't tell us that the first time, right

A nope

Q okay, if you can lean forward close to this or I'm not gonna be able to hear you and tell me what happened or tell me what it was and what happened between you and Kenny the first time

A the first time. . . . is that I came back into town and I ran into Kenny and . . . um . . . we had agreed to meet at The Reef, tavern or bar or whatever it is. Uh . . . and go drinking, thinking he was an old friend of ours . . .

ya know, why not . . . go have a few drinks. I . . . was going to a job interview that day and I was gonna go have some drinks afterwards with him. In the process we, he introduced me to like three other people . . . and this other guy went with us. After a few drinks were bought Kenny decided it was getting a little expensive and that we should just go get a bottle and go to his place and drink. Me, I'm seeing no reason not to trust Kenny, okay ya know, why not . . . so we went to his apartment in Steve's truck and . . . we went to a liquor store first, got a bottle of vodka, went up to his apartment . . . Kenny sent Steve to the AM/PM on the corner right by his house to go get some orange juice to mix with the vodka . . . and in the process Kenny had pinned me down and . . . was . . . tearing at my clothes and I was fighting back . . . there were scratches on his neck. And his, his skin under my nail for a few days . . . that was gross, and then, anyway um . . . we were fighting, we didn't get along. At that point I was screaming for him to get the fuck off me. He wouldn't get off me . . . Steve heard me screaming through the window, ran upstairs, yelled at Kenny to let him in. Kenny didn't respond. Dude said, "I'm gonna kick your door in! I'm gonna kick your door in!" and Kenny did not still respond. Dude did kick the door in and pulled Kenny off me and I fled with the dude to his car . . . and went to go get some cigarettes and . . . for one reason or another I'm not quite sure of, we were supposed to meet up with Kenny again at the park later on that night. We were screaming, I was screaming cuz he had stolen my wallet. I think that's the only reason why we did go meet back up with him. I realized my wallet was gone when I went to go buy him a pack of cigarettes I didn't have my ID . . . and um . . . there was an officer there that made him give me my wallet back . . . at that point . . . took off again with Steve. We go to a parking lot

and Steve was like, did, just, did what happen just really happen? Did it really happen? Is this really happening? And I'm like, 'Yeah, this is really happening' and he gave me his phone number. He's like 'Well, if anything is to ever come of this here's my phone number. I live in Rochester and I work at Labor Ready every day.'

Q do you remember Steve's last name

A I don't. I might of written it down in my book. I know I wrote down . . . his name and number in my book, but that's at the house. I don't have it with me right now

Q do you remember his phone number

A um um (no)

Q okay. How long ago did this happen

A two weeks, a month . . . long than that maybe, I've only been back in town for a short bit

Q okay, is this the same story that you told to the Detective earlier tonight

A no

Q okay, the only difference is that you

A put Michael in Steve's place

Q okay, but

A and finished off what happened instead of me just leaving

Q okay, but the story you told about what happened tonight was actually the incident that happened a couple weeks, maybe a month ago

A yes

Q okay. Did you tell Mike about what happened that day.

A yeah

Q how did he respond to that

A got very upset . . . he was hurt . . . I think that his friend had done that, had violated his trust and his respect and violated my trust and my respect . . . I think he felt violated just as much as I did

Q okay. How did you end up back over there today

A (pausing) we were out with the baby . . . playing in a park with the baby and drinkin' . . . and one way or another a conversation . . . however it lead up to it . . . we were talkin' about something or someone mentioned Kenny . . . Mike, he's like 'Yeah, that dude deserves a ass whoopin' . . . ya know . . . and . . . we decided to back to the apartment and drop the baby off . . . and um . . . come downtown and Mikie wanted me to show where Kenny was living where uh, where it was (inaudible)

Q okay. What time were you down here, what time were you down here earlier today? What time did you start this

A we had to, it had, it had to of been before 5:30 because we called the Capital Shuttle. The Capital Shuttle's free

Q okay, you said somebody mentioned Kenny's name in conversation

A it had to of been me or the friend of ours we were drinking with or Michael. Someone had mentioned his name . . . we all hang out with all the same people that know everyone else

Q okay

A it's a pretty tight click

Q and when you brought up Kenny's name did it get Michael upset

A yes . . . he got enraged. He was drunk. He wasn't like really drunk, he was just ya know . . . he was past tipsy

Q okay, who's suggestion was it then to go over and square things up

A (pausing) it was his suggestion and I have to admit that I agreed

Q is this the same apartment that you'd been to before

A yeah

Q had Mike ever been there before

A no, apparently not if he needed me to show him where it was

Q okay. What other places did you go look for him downtown

A (pausing) at his hangouts spots

Q can you tell me where you went

A we went to The Reef. We went to 4th Ave Tav. We went to B & R. He wasn't in any of those places so we figured that he was at home

Q okay, and when you didn't find him in any of those places you went to

A his home

Q and tell me what happened once you got to his home

A we knocked, I knocked on the door. Mikie was like 'That's not his apartment. That's this other guy's apartment.' I was like, 'No, this is his apartment.' He said, well, I guess it might be wrong and then I knocked on a different door . . . and um . . . but, Kenny answered the door said he wasn't receiving any company. Asked me if I was, he's like "Aren't you mad at me?" And I was like, "Yeah" and . . . he was . . . it was, and then we asked him about some . . . money that owed, owed us for a few years now. We knew we weren't gonna collect it but we still asked ya know, you gotta do that . . . and uh . . . we were all just standing there in the doorway . . . one thing lead to another, not very, didn't take

Q okay, you gotta speak up

A didn't take very long for everything to happen . . . and then we ran downstairs, down the street and I begged Michael to catch a bus with me. I said, "Let's just catch a bus. Let's get the fudge outta here.

Q when you say everything happened in the doorway, want do you mean by that

A (pausing) Kenny was stabbed

Q how did Kenny get stabbed

A with a knife

Q whose knife

A (pausing) maybe Michael's

Q what do you mean by maybe Michael's knife

A it could of been his knife. It could of been someone else's knife

Q did you see Michael stab *him*

A (pausing) yes, I saw Michael stab him

Q did you stab him

A I did not stab. him

Q how many times did Michael stab him

A I think three

Q okay, when you say you think, what do you mean by that

A it means I shut my eyes and I didn't really watch. I was like in shock and I think three

Q what did Michael say to him when he stabbed him

A I think he called him a punk. . . . I heard the words mother fucker. . . . I don't quite remember what was said after that

Q what else

A (pausing) well, when we were walking and the cops came and yelled for Michael and I to get on the floor

and. . . . (inaudible) I was like, "It's wet." . . . (inaudible) . . . and I've been here ever since. They just took my clothes

Q okay, I need, I need you to speak up a little bit for me

A that's it. That's it um . . . we saw Kenny fall down, heard him grunt. We ran like the wind as far as we could. Not as far as we could but as fast as we could . . . try and debate what to do next. I don't think it was all planned out what was all gonna happen or else, I think we would of talked about what we were gonna do after the fact. So I think that as far as that goes he was gonna go over there and kick his \ass. . . . I think those were the actual intentions, but since Kenny was being a punk . . . I think it just made Michael more angry

Q was Michael mad

A infuriated

Q you said infuriated

A yes, he was angry

Q have you ever seen him that mad

A yeah, I've been with him for years. I've seen all sides of him

Q was he in control of himself

A (pausing) I can't answer that with any. . . . explain more on what you think out of control (inaudible)

Q would you describe, describe him as being out of control

A (pausing) no, Mike has, I don't know but he's . . . no . . . I wouldn't describe him as being (inaudible) out of control

Q the first time that Mike stabbed Kenny, did you see where he stabbed him at

A (pausing) I think it was the stomach . . . I didn't, it was like that. It wasn't like that

Q okay, the, the, hang on a minute. The tape recorder's not gonna be able to see what you're doing so you're describing his holding, his holding the knife in his hand and like punching him in the stomach with it (describing fist, thumb up, knife extending from fist toward victim)

A yes

Q pardon

A yes

Q okay. Did you see how many times he stabbed him after that or you're just guessing that it was two more times

A just guessing

Q okay

A Mikie had asked me after we were walking, he was like, "Did you see how many times I stabbed him?" I said, "I don't know, I think you did it about three times." He's like "Three?" and I was like, "Yeah, I think so." He's like, "Do you know where this came from?" He was asking me about the cut on his hand. I was like, "Dude, I have no clue what that came from. How come you don't know?"

Q did he cut himself in the process of stabbing this guy

A that's what I'm thinkin', but I'm not sure

Q did Kenny do anything to fight back from this assault

A (pausing) I know he reached into his pocket . . . or somethin' . . . I don't know what

Q after he was stabbed

A he saw Michael coming up. He lifted his hand . . . his chest open, he might of went to go strike his hand out or something and then (inaudible)

Q okay, you, you gotta speak up

A okay, he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his . . . put his right hand in his right pocket . . . took a step back. . . . Michael proceeded to stab him . . . then his hands were like . . . how do you explain this . . . open arms . . . with his hands open and he fell down . . . and we ran (describing subject holding hands open, palms toward assailant)

Q okay, when he's standing there with his open hands you're talking about Kenny, correct

A yeah after, after the fact, yes

Q did you see anything in his hands at that point

A (pausing) um um (no)

Q okay. I asked you earlier if . . .

A I think he took a step back in his doorway tryin' to get back into his house, into his apartment

Q okay, was there anybody else there with you when this happened

A um um (no). There might of been someone inside his apartment that's why he might of not been accepting company. I don't know. We didn't see inside of his apartment

Q okay, you said there might of been somebody that's why he wasn't accepting company. When, when you knocked on the door did he answer the door right away or did he say inside he wasn't accepting company

A oh no, he answered the door. He didn't say till he um, till he realized who was there. Like I said, ever since Kenny saw me from that night forward he's been hiding from me. He's like seen me and then he goes and runs . . . goes and run, goes and run and goes and runs

Q okay, so he saw you and Michael

A yeah. In between all of this from the time it happened at his apartment . . . to, to tonight, I've seen Kenny like 4 or 5, maybe 6 times and every single time and every single time I saw him he would run and hide from me, which I quite don't understand and I would kinda like go the opposite direction from which way I was comin' and try to avoid him. He opened the door, he saw Mikie and me . . . and then he was like, 'Well, ya know, I'm definitely not accepting any company," And we're like, 'Well, do you have any of that money that you owe us?" ya know, cuz it's like 300 bucks and he's like 'No, I don't have any of the money.' 'You owe us' and then we're like talking about ya know, how, 'How you doing? How you doing?' Ya

know, back and forth and then. . . . when further in the conversation anyway. . . . and that. . . . was when it happened

Q you said that's when it happened

A (pausing) I don't quite remember what part of the conversation, I remember there was a dead stand still and nobody talking for like a couple seconds and then it happened. I don't quite remember exactly what was said previous. I remember him asking me 'if you were mad at me' and I remember me telling him I was. I remember . . . talking about other things. . . . vaguely

Q okay. Are you sure that you didn't stab him

A I'm positive I did not stab him

Q okay. Sylvia, is there anything else that you can think of that you wanna make known at this point

A that . . . I feel it was justified what happened . . . I feel that Mikie being my husband had a right to get hurt over the fact that his friend had tried to do that to me. I feel that . . . me not telling Michael about it would of been violating . . . a confidence and a trust in our marriage and our relationship, and I feel that that's really important to me. Michael's my best friend and I'm his . . . ya know, any . . . there isn't anything . . .

Q is your husband a racist

A no, his [sic] not a racist

Q describe his relationship with minorities

A I'm a hundred percent Mexican. His child is half Mexican

Q okay. Has he ever possessed any white supremist literature

A I think someone gave him a magazine and he brought it home

Q okay, but he doesn't now ordinarily practice that then

A no, gosh no, no, no Mikie's one of the most fair people you'll ever meet

Q okay, anything else that you want to add at this point

A (pausing) um um (no)

Q are you being completely truthful with me . . . this time

A I wanna add that the last time I was afraid and I told what had happened. I just took both the stories and coincided them . . . and tonight I just took or this time I'm just taking tonight's story

Q okay, you were afraid when Detective Gies talked to you and then what you ended up doing was replacing your husband and put him into the uh, story with the first assault that happened with Kenny and you, correct

A yes

Q okay. The information you gave me right now on this statement though is what actually took place

A yes

Q okay. Detective Holmes, anything else

HOLMES nothing

COSTA Sylvia, were there any uh, threats or promises been made to you to get you to make this statement

A no

Q pardon

A no

Q okay. Today's date is still the 5th of August, 1999. The time is 2309.

Transcribed:
JDC:jp

TRIAL EXHIBIT NO. 44

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

[Caption Omitted In Printing]

Case Number 99-6530
Detective Sergeant Jim Costa/Detective Russ Gies – 2nd Statement of Michael Crawford

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This will be a statement. It's concerning case number 99-6530. This will be the statement of Michael Crawford. Today's date is the 6th of August, 1999. The time is 45 minutes past midnight. This statement is being recorded at the Olympia Police Department. Also present is Detective Russ Gies.

Q Mike, do you understand this statement is being recorded and is this with your consent

A yes

Q would you give me your full name again and spell it please

A Michael Crawford – M I C H A E L – C R A W F O R D

Q and your address

A 1919 Evergreen Park Drive

Q do you have a phone number there

A um, yes, 352-2476

Q okay, and uh, are you working

A no

Q okay, how about your date of birth

A 11/22/77

Q okay

GIES what's your apartment number

A 108

COSTA okay Mike, I'm gonna go through and I'm gonna read a warning and a waiver of your constitutional rights. I know that these were read to you before, but I'm gonna go back through it again. It says: You have the right to remain silent. Anything you say can be used against you in a court of law. You're not under the age of 18, correct

A correct

Q okay. You have the right at this time to an attorney of your own choosing and have him or her present before and during any questioning or the making of any statements. If you cannot afford an attorney you are entitled to have one appointed for you by a court without cost to you and have him or her present before and during questioning or the making of any statements. You have the right to exercise any of the above rights at anytime before or during questioning or the making of any statements. Do you understand each of those rights as I've explained then [sic] to you

A yes

Q okay, do you have any questions about any of them

A (pausing) um, no

Q okay. On the bottom again, another statement, it says: I have read or have had read to me the above

explanation of my constitutional rights and I understand them. It says, I've decided not to exercise these rights at this time. It says, any attached signed statements are made freely, voluntarily without threats or promises of any kind. Since we're obviously not doing any kind of a signed statement, and we're doing it by uh, tape recording again, is this with your consent and uh, it is freely, voluntarily and being done without any threats or promises

A yes

Q okay. We came and got you about 5 minutes ago, correct

A yes

Q and I told you that um, obviously I sat through an interview that you did with Detective Gies earlier and I also um, had some idea as to a conversation that he had with your wife. You two were involved in an incident that took place earlier tonight where a subject was stabbed, is that correct

A yes

Q okay, and I told you just a little while ago that there was obviously some inconsistencies in the statement that you gave us and the statement your wife gave us and uh, she clarified some of the uh, facts. I told you that some of the things you told us was truthful and then some other things you told us weren't truthful, is that correct

A yes

Q and I told you at this point what I would like to do is to hear from you exactly what took place this evening

. . . in the area of the truth and not the inconsistencies that we got earlier, is that correct

A yes

Q okay. What you told the Detective earlier tonight when you talked to him is not the whole truth about what happened, is that correct

A yes

Q okay. Let's take this thing back from the uh, start of earlier tonight and where, where were you guys at before you ended up over at Kenny's house

A downtown

Q okay, you were downtown with your wife and child

A no, my child wasn't with me downtown

Q okay, were you guys at a park earlier today

A yeah, we were over at um . . . my friend's house and he had a um, playground and shit

Q okay, what, tell me about the conversation you had. Tell me how you got on the topic of Kenny or how he came up, his name came up

A I talked to him about him trying to rape her

Q okay, when did this attempted rape occur

A um . . . while we were broken up and she was comin' up back here to try to get back with me

Q okay, do you remember how long ago that was

A no, I don't

Q okay, was it a week ago, two weeks ago, three weeks ago, longer

A it was longer than three weeks ago. It was like a month, month or two ago

Q okay, and you, you and your wife were split up at that point

A yeah

Q okay, and she told you something happened between her and Kenny

A yes

Q okay, tell me about the story. Tell me what she told you happened

A well, first she thought that I'd got, got Kenny to try to rape her or somethin' and, and I was like, no way, ya know, ya know, I'll kick his ass, somethin' ya know, I just . . . I, I didn't, I couldn't understand why she'd think somethin' like that ya know, and she said that he told her that and was yelling stuff about me like I told him to do it . . . and so, and I haven't seen him in all this time till up to today

Q okay, so sometime ago your wife told you that when you were separated that he did or he made an attempt at raping her and you were upset with him about that

A yes

Q okay. What happened today that led up to this incident that you had with him? Where were you guys at when his name first got mentioned

A we were at my friend's house

Q okay, who, who is your friend

A Chris's

Q Chris

A Martin

Q Chris Martin. Where does Chris live

A in some apartments next to the apartments that we lived in

Q okay, and you were over there this afternoon about what time

A I don't know

Q okay, and then how did Kenny's name come up

A I don't remember

Q okay, when his name came up in conversation what did that do for you

A it made me mad, mad

Q okay, how mad

A like mad enough to go find him

Q okay, is that what you guys did at that point

A yes

Q what, what did you do with your child

A we dropped him off at Ray and Brandy's house

Q at Ray and Brandy

A where I live

Q okay, friends of yours

A yeah

Q okay, and then who took off to go find Kenny

A we both did

Q okay, you have to tell me who we both, who do you mean

A me and Sylvia

Q okay, do you remember about what time you started to look for him

A no

Q okay, at the point you started to go out and look for him, did you intend to stab him at that point

A no

Q you were just gonna go find him and do what

A just, I don't know, I just wanted to confront him on it and I don't know, take it from there

Q okay. You, you said earlier you were mad enough to kick his ass

A yeah

Q okay, is that what you were gonna do? Is that what you intended to do

A (pausing) I wasn't sure

Q okay, but you were upset about what had taken place before involving your wife, correct

A yes

Q okay, where, where did you go to find him

A huh?

Q where did you go to find him

A to where she, the apartment she said it happened at

Q okay, had you ever been to that apartment before

A not, not when he lived there

Q okay, so you didn't know where he lived

A no

Q okay, is that why you took your wife with you

A yeah

Q okay

A and I wanted to confirm stories and everything

Q okay, before you went to the apartment where did you go look for him then

A (pausing) um . . . we stopped in a couple bars

Q do you remember the bars

A uh . . . I know The Reef was one of 'em

Q okay, do you remember any of the other ones

A uh, 4th Ave I think . . . is the name of it

Q 4th Avenue Tavern

A yeah

Q okay, anything else

A Uh, B & R

Q what's, now what's B & R

A Bread and Roses

Q Bread and Roses. Are these places he normally hangs out at

A uh . . . yeah, I guess

Q okay, and you didn't find him there

A no

Q do you remember if you talked to anybody or saw anybody at these places

A no

Q did you ask anybody when you went in there if they knew Kenny or knew where he was at

A I don't remember

Q okay, when you didn't find him at those places then where did you go

A um, to the apartments

Q okay, tell me what happened once you got to the apartment

A um, we went up and knocked on the wrong door and he ended up comin' out into the hallway

Q okay, is there two doors at the top of the stairs

A there was three. There's, there's one . . . that's like . . . the top of the stairs is like this and there's a door here and a door here, and a door here . . . and we came and we knocked on this door . . . and then he came out of this door.

Q okay. When he came out of the door, what did you guys say to each other

A well, at first I asked him about the money that he had owed us ya know, he had owed us for a few years. It's kinda not really a big deal anymore. I've kinda wrote it off ya know, but um . . . I didn't even have to ask him what happened with Sylvia cuz he, he already started askin' her if she was mad at him and stuff . . . and that told me right there that there was some truth to what she was sayin' and shit and ya know, then I, I, I started in at him fuckin' ya know, sayin' 'What the fuck dude? What'd you do?' ya know, and he started gettin' a attitude and fuckin' one thing lead [sic] to another and fuckin' we got into a altercation and I stabbed him

Q okay, tell me what was going, tell me what was going through your mind when he, when he uh, started arguing with you at that point

A well

Q tell me what you were feeling

A I was feeling angry and fuckin' . . . scared and . . . just . . . the whole combination. Just adrenalin goin' through me and. . . .

Q where, where was uh, Sylvia when you first stabbed him

A um. . . . I'm not sure, somewhere close

Q okay. I'm, I'm gonna ask you a question now, and I'm not doing it to offend you or anything, but is there any chance at all that Sylvia stabbed him

A (pausing) I wouldn't say that

Q okay, what do you mean you wouldn't say that

A even if she did, I wouldn't say I'm just being honest

Q well, I, I understand that she was upset with him. . . . you're telling me that you stabbed him, right

A (pausing) I believe so

Q okay, what do you mean by you believe so

A (no audible response)

GIES be honest with us Mike

A (no audible response)

Q come on

A (long pause) I don't know if I can do this

COSTA well, I know it's tough, but again, it has to do with the truth, and you're . . .

A (sighing)

Q I have my idea as to how I think it happened, and I guess what I'm saying to you is, is that are you, are you willing to take the blame for something that maybe you didn't do

A (no audible response)

GIES help us out Michael, tell us the truth

A (no audible response)

COSTA how did Kenny get stabbed

A (pausing) when we all started fightin' and he got stabbed

Q okay, what do you mean we all started fighting

A well, it was . . . she was right there in the mix of it all, it was really dark in there

Q who had the knife

A (pausing) I had the knife

Q what hand was your knife in

A I don't remember

Q you don't remember if it was in your left hand, your right hand

A no

Q how many times did you stab him

A I don't know

Q you don't remember

A um um (no)

Q do you remember the first time you stabbed him

A (pausing) it was really dark

Q okay, but you don't need to see no matter how dark it is to know how many times you stabbed him. Do you know what I'm saying? And we've already gone over the

hump with the truth of the incident of why you went over there in the first place and it had to do because this guy had done something to your wife and you were upset with him. You told us you were aggravated. You didn't deny that. You didn't uh, when you first sat down with the Detective, you didn't deny that you were mad. You turned around and told him that you were enraged, and that's understandable. I guess at this point is, is that I'm, I'm just looking for the truth as to what happened. I mean, you're not arguing that you didn't stab this guy, you're not arguing that you were upset, but we've got some minute details that aren't clear and that's what I'm asking you

A where did you come up with that she stabbed him? . . . can I have some more water, please

GIES sure

COSTA that's what I'm asking you

A (pausing) I didn't see her stab anybody

Q okay. How did you cut your hand

A I honest to god don't really know the truth to that question

GIES did you grab Kenny, maybe grabbed on this shirt and onto his body

A probably

Q during the confrontation

A probably

COSTA okay, Mike, let me, let, let me ask you a question. I know why you went over there now um, what did uh, what did Kenny do after he was stabbed

A he started, just kept fightin'

Q okay. Did you ever see anything in his hands

A I think so, but I'm not positive

Q okay, when you think so, what do you mean by that

A I could a swore I seen him goin' for somethin' before, right before everything happened. He was like reachin', fiddlin' around down here and stuff . . . and I just . . . I don't know, I think, this is just a possibility, but I think, I think that he pulled somethin' out and I grabbed for it and that's how I got cut . . . but I'm not positive. I, I my mind goes blank when things like this happen. I mean, I just, I remember things wrong, I remember things that just doesn't, don't make sense to me later

Q okay

A I don't know why

Q okay. Let me ask you a question then going back over the details tonight. Are you clear about why you guys went over there

A yeah

Q you're clear about the details up to that

A yeah

Q the stops you made at the other bars and the taverns looking for him

A yeah

Q okay

GIES why Sylvia, do you think, is as upset as you when you guys walked over there

A (pausing) yeah

Q did she express her anger or attitude that we're gonna go kick his butt

A (pausing) I don't remember

Q but she was upset

A she was upset

Q she certainly knew that you were going over there with the intention of making things right

A yeah

Q be honest with you Michael, with us . . . did, did she have possession of the knife? Please be honest

A (pausing) I don't know

Q could she of had possession of the knife

A she could of

Q and how would she have gotten possession of the knife

A (pausing) I don't know

Q I mean, I'm trying to figure out a scenario of her pulling it out of your sheath or it would make more sense if, I guess, if you handed it to her before knocking on the door or something of that nature

A I wouldn't, I wouldn't hand her the knife

Q you would not

A I would not hand her the knife

Q okay, did she take it out of your sheath Michael

A I could see her doing that if I would if I would of got into a altercation

Q do you recall taking the knife out of your sheath

A I don't remember takin' the knife out of my sheath

Q okay. Do you recall one of the three stab wounds being made by her or two of the three or three of the three? Be honest

A I don't, I don't recall

COSTA okay. Mike, is there any uh, not to prolong this, is there any doubt in your mind about the things we've talked about earlier, about how you ended up over there

A about how we ended up over there?

Q right

A (no audible response)

Q is that clear

A it's not real clear. I know that we stopped and looked in some bars and that we stopped and looked in B & R

Q okay, and you're clear about that

A yeah, I'm clear about that

Q okay, and you're clear about being angry and going over there to try to . . . even up the situation with what he did to your wife from a prior incident

A yeah um, part of it, I wasn't sure if I believed it or not, I needed, I needed hear, hear from him ya know . . . I needed to see what he said

Q okay, and once you heard what he said

A oh, I started talkin' shit and he started talkin' shit, and . . . we got in a fight

Q and then he got stabbed

A yeah

Q okay

GIES Mike, do you carry that knife pretty much all the time

A sometimes I do, sometimes I don't

Q how long have you carried it on and off

A um, a few months

Q why

A protection

Q are you familiar with it? I mean, you're, you carry it on and off, you're familiar with how to grab it and use it

A well, I've never had to use it in a situation before

A well, I just . . . um, actually she bought that knife for me down in Portland . . . it's just the only knife I've had

Q okay

COSTA Mike, anything else you think you need to add to this statement at this point

A (pausing) um . . . (long pause) ___ . . . no

GIES Mike, be honest with us please. Did she use the knife too

A (pausing) did she use the knife too? . . . I, I really don't think so

COSTA okay, anything else Mike

A huh?

Q anything else you need to add to this statement

A (pausing) um. . . . no

GIES let me ask one more question Detective. Do you specifically recall stabbing him the three times

A I don't, I, actually I blacked out through the whole thing

Q do you specifically recall the first time though

A I really, actually, I don't. I had asked, I had asked the nurse in the hospital is how I really found out. I asked the nurse. I go, 'Did I, did I get him?' . . . and she said, 'Yeah, you got him.'

Q okay

COSTA okay, this will uh, conclude the statement. Today's date is still the 6th of August, 1999. The time is 1:07

GIES be turning off the tape at this time.

Transcribed:
JDC/REG:jp

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543-0001

June 9, 2003

Bruce E.H. Johnson
Davis Wright Tremaine LLP
2600 Century Sq.
1501 Fourth Ave.
Seattle, WA 98101-1688

Re: *02-9410 – Crawford v. Washington*

Dear Mr. Johnson:

The Court today entered the following order in the above case:

> "The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted."

* * *

Sincerely,

WILLIAM K. SUTER, CLERK

/s/ Denise J. McNerney
Denise J. McNerney
Merits Cases Clerk
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Enclosures